Binding a Future of Violence:

Acts, Signs, and Interpretations in the Racial State

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A legal tradition is hence part and parcel of a complex normative world. The tradition includes not only a corpus juris, but also a language and a mythos-- narratives in which the corpus juris is located by those whose wills act upon it. These myths establish the paradigms for behavior. They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic. These myths establish a repertoire of moves-- a lexicon of normative action-- that may be combined into meaningful patterns culled from the meaningful patterns of the past. The normative meaning that has inhered in the patterns of the past will be found in the history of ordinary legal doctrine at work in mundane affairs; in utopian and messianic yearnings, imaginary shapes given to a less resistant reality; in apologies for power and privilege and in the critiques that may be leveled at the justificatory enterprises of law.

Robert Cover (1995) "Nomos and Narrative," 101

TABLE OF CONTENTS

Introduction..1

I. Signs and Their Temporality:
The Performative Power of Interpretation in the Supreme Court 21

II. Policing Potential Violence...55

III. Who Has the Right to Self Defense?
What Kyle Rittenhouse's Trial Tells Us About the Racial State...80

IV. The Semiosis of Sedimentation: Applications for Pragmatist Cultural Theory...................112

Conclusion..152

References..157

Introduction

Max Weber's definition of the state as the "human community that (successfully) claims the monopoly of the legitimate use of physical force" has become almost axiomatic. What would it mean to think of the state not as having a monopoly on legitimate violence, but as having a monopoly on the *processes of legitimation* for violence? While these phrases may amount to very similar things in practice, approaching the relationship between the state and various forms of violence from the perspective of legitimation shifts the analytical emphasis to processes of interpretation, and the legal validation and perpetuation of certain interpretations over others. This dissertation takes as its focus interpretations of violence made in certain American court cases, and the role of those interpretations in creating and perpetuating a racial state.

A Hermeneutics of Violence

Embedded in the sociology of violence is the ongoing debate about how to define the term itself. Central to this debate is the dual-sided problem of imposing explicitly defined conceptual boundaries of any content: on the one hand, make the definition too narrowly specific and risk excluding events, circumstances, and actions that could arguably be violence, or, on the other hand, craft a definition too open-ended and lose the utility of a defined concept, definitionally unable to preclude much of anything being defined as violence, thus voiding the ability to speak clearly about violence as a bounded phenomenon at all.

Approaching violence phenomenologically assuages some of these issues. Violence must involve actors, whether those actors be individuals, organizations, systems, or groups. Thus, violence can be conceptualized as being a product of the experiences of the actors participating in the action in question. However, actors participate in acts of violence in distinct ways,

producing divergent experiences and interpretations of the same event. In the case of a simple punch, the actors involved in this violent event include the person who threw the punch, the person who received the punch, and, potentially, any person who observed the punch being thrown and received. The experience and interpretation of each of these three actors must be taken into consideration when crafting an analysis of the violence that unfolded.

German scholar Teresa Koloma Beck's theory of violence makes central this element of interpretation. Beck's 2015 phenomenological approach to understanding violence takes the interpretation of each of these three positions as critical to understanding the event. Rather than conceptualizing the participants as filling distinct *roles,* say of "victim," "perpetrator," or "witness," to use terminology common to the sociology of violence, Beck uses the terminology of "performer," "target," and "observer" to describe different *vantage points* from which it is possible to interpret violence. She specifies that these terms refer to "vantage points" as opposed to "roles" for a variety of reasons. Just as the nature of the violence can be interpreted quite differently by each different participant, so too can the nature of one's participation in the event be interpreted differently by each participant.

While A may have felt herself to be only an observer, B may feel that A served a more active capacity in perpetrating the violence. Further, such positions of experiencing violence are prone to change, even at any moment throughout a temporally bounded event: during a fist fight two individuals might alternate throwing punches, thus alternating between experiences as a performer and a target. Or, the interpretation might change as the temporal distance between the event and its recollection increases: while one might have felt, in a moment of violence by which one felt traumatized, that one was a target of said violence, one might come to feel retrospectively that in fact they had only been an observer. The language of "positions"

privileges the interpretation of each participant in the violent act, rather than imposing the interpretation of a presumed-neutral outside party (like a researcher) as is the case when one assigns fixed roles such as victim or perpetrator. This terminological framework establishes violence as having an irreducibly subjective dimension (as suggested by other proponents of a phenomenological approach, such as DeHaan (2009)) without losing any of the analytic utility such approaches sometimes lack.

Beck argues that violence brings struggles of social order to the body, and plays out those struggles of order through the body. Pain and physical suffering become correlated with positions of less social desirability and power, and inflicting pain and physical suffering become correlated with positions of more social desirability and power. Violence is not the only means by which social order is imposed on the body-- as Bourdieu's *habitus* and Foucault's *biopower* show, modernity is made up of myriad non-violent impositions of social order onto the bodies and bodily movements of individual actors. But Beck's definition of violence as one bodily means by which struggles of social order materialize is a useful framing for understanding the stakes involved in interpreting violence. It is this process of the translation of bodily experience into social order that requires the third participant in Beck's triangulation of violence: the observer.

This triangular understanding of violence as including the positional experience of an observer can be adapted and mobilized for theorizing the role of the state in interpreting violence, through the legal system. While Beck's model is a phenomenological one, I am not using it to make a phenomenological argument. Rather, what I find particularly useful about Beck's model as a starting point is that she makes the position of the observer central to understanding violence because it is observation that translates the physical act into the struggles

of social control that exist around it. Beck argues that one of the reasons violence is so powerful as a means of social control is not due to its physical characteristics, but to its symbolic meaning, which requires that the violence be observed and interpreted (even if by no one other than the target and performer themselves).

Acts of violence do not just affect their targets via bodily harm; rather, they have encoded symbolic value that allows some acts to be particularly humiliating, some to allude to imminent future violence, and so on. This symbolic value is distinct from the physical severity of the acts themselves, and is attached instead to systems of symbolic and social order that can vary across cultures (Sahlins 1976). For example, a male being raped is a particularly shameful and humiliating act of violence in many cultures, in a way not predictable simply by the amount of physical pain or bodily damage it causes it relation to other acts of violence, because the act has symbolic meaning that marks the target as feminine within the context of a broader social order that devalues and dehumanizes the feminine.

Beck argues that it is the position of the observer that facilitates the move from the plane of physical harm to the plane of symbolic social order. The interpretation of the act from the position of the observer "reads" the symbolic meaning of the act and situates it within systems of meaning in societal hierarchies. Thus, it is not only the physical act that has consequences for the target (and the performer), but rather the *interpretation* of that act, which communicates what the act might mean for one's current social position, risk of experiencing future violence, and so forth. The position of observation still exists when only the target and performer are physically present at the site of the violent act—both apply the filter of observation that contextualizes the physical act within the symbolic order that surrounds it. In this way, how an act is interpreted by

the position of the observer affects what outcomes the violence might have for all involved. It is this semiotic element of Beck's theory that I find most fruitful.

The State, the Observer, and the Law

Though a phenomenological theory is useful for considering the semiotics at play in the interpretation of violence from various perspectives, such an approach assumes the equal validity of each interpretation. However, the state plays a unique role in observing and interpreting violence. While some acts are obviously and indubitably legal or illegal, many more are ambiguous-- a killing may be an illegal murder, or a very legal wartime strike or act of civilian self-defense. In fact, the vast majority of criminal trials ultimately boil down to two questions: a) What happened? b) Is what happened illegal? Both of these questions hinge on interpretation. While Beck argues that a singular definition of violence is not possible because violence is experienced from a variety of positions, including that of myriad observers, the state does not function with a phenomenological methodology. Rather, the state, manifest in the legal system, represents itself as outside of this phenomenological equation. Court cases result when conflicting interpretations of an event arise. The legal system hears both interpretations and then produces its own, which is not framed as an interpretation, but as a determination of the truth.

It is within the jurisdiction of the state to determine whether certain acts qualify as violence, above and beyond the calls made by citizens experiencing violence from the position of observer, partially because the legal arm of the state is, to some extent, durable over time and space, and because it is backed up by mechanisms of law enforcement capable of acting on the state's interpretation by mobilizing police officers, removing convicted people into imprisonment, or even executing people on death row. In this way, the legal system functions at the intersection of two arms of state power-- the discursive authority to legitimate some

interpretations over others, and the functional capacity to enforce (with force) various consequences of interpretations (such as prison sentences, etcetera).

In order to routinize much of these processes of interpretation and enable them to be performed with at least some consistency across the very large land mass the state takes under its rule, laws have been established to streamline the individual onus of interpretation. Rather than having one singular, ultimate voice of the state, we have tens of thousands of individual police officers, lawyers, judges and so forth who are authorized to offer interpretations on its behalf. Laws are the first-order attempt to mitigate whatever interpretive discrepancy might arise between these individual representatives of the state, and where laws are considered silent, precedent fills in some of the gaps, establishing predictable patterns of interpretation that override the need for individual readings of isolated events.

In this way, the goal of law is not to discover the "truth" about violent events, but rather to construct a uniform interpretation thereof. Joseph Raz (2009) highlights this crucial difference when he notes that though law and morality are often compared, interpretation is central to our legal practices, but not to our moral practices. Robert Cover (1995) makes a similar observation in his analysis of Justice Louis Brandeis' criticism of the concept of free speech: "Brandeis recognized that the coercive dimension of law is itself destructive of the possibility of interpretation. If we think of interpretation, unrealistically, as the mere offering of disembodied doctrine, the coercion of silence of which Brandeis wrote would rest on a claim that courts ought to possess the unique and exclusive power to offer interpretations" (149). The law, then, can be understood not as a moral code, but rather as a system for streamlining interpretation into a set of durable rules. It is one of the aims of this dissertation to show how the process of creating

durable interpretation takes place, and to highlight the interpretive mechanisms that produce both narrative stability and possibilities for reinterpretation.

There is a significant scholarly tradition for examining the law as discursively generative. In her introduction to the third edition of H. L. A. Hart's *The Concept of Law* (2012), Leslie Green writes that "law sometimes pretends to an objectivity it does not have for, whatever judges may say, they in fact wield serious power to create law" (xv). Moreover, Hart describes law as one half of a co-constituting cycle, along with custom. Green summarizes: "in one way law supersedes custom, in another it rests on it, for law is a system of primary rules that direct and appraise conduct together with secondary social rules about how to identify, enforce, and change the primary rules" (ibid). A category of legal scholarship that considers this co-constitution approaches the law sociologically, as a discourse, examining what the discourse of the law establishes as truth, how it does so, and what other discourses it competes with or forecloses. Heavily influenced by Foucauldian thought, this arena has been dominated by feminist jurisprudence.

This perspective is well represented by Catherine MacKinnon, whose best-known argument in legal circles is not her infamous work on pornography, but rather her insistence in *Feminism, Marxism, Method, and the State* that feminist lawyers call attention in their practices to the fact that much of what the law takes to be impartial is a de facto male opinion, and is as such unconstitutional, under the Equal Protection Clause of the 14th amendment. She writes that "[male dominance's] point of view is the standard for point-of-viewlessness; its particularity the meaning of universality," and argues that when unidentified and resisted in court, this point of view is entirely hegemonic and enforced by the common practice of state law (MacKinnon 1983, 635). This problem of hegemonic point-of-viewlessness has become a hugely central issue for

feminist jurisprudence. On the one hand, as MacKinnon points out, the law is written from the perspective of men, and as such furthers their interests unless explicitly pushed not to do so. On the other hand, the Supreme Court's ruling in *Reed v. Reed* in 1971 is often cited as the turning point for the explicit bias of law in favor of men (Scales 1993). The verdict in *Reed v. Reed* rendered a state's explicit statement of favor for the male in an estate dispute between and male and female unconstitutional under the Equal Protection Clause, which was seen at first as a great win for feminism and gender equality under the law. However, MacKinnon and other feminist legal scholars identify this as the moment at which gender inequality only became more subverted. We can think of this as the "gender-blind" counterpart to the colorblind racism described in the courts by Alexander, Van Cleve, etcetera.

MacKinnon argues that the state's *claim* of the law's neutrality and lack of gender bias since *Reed v. Reed* is a huge part of its power. By establishing the discourse of gender-blindness, the law exists as a doctrine of "truth" that pervades not just the court systems and the police departments, but the interior lives of all residents under the law's jurisdiction. Civilians internalize the doctrines established by the law through its claim to ultimate truth, and thus regulate themselves accordingly. Similar approaches include the oeuvre of Carol Smart, Lori G. Beaman's *Defining Harm: Religious Freedom and the Limits of the Law* (2008), and Vicki Bell's *Interrogating Incest* (1993), as well as the oeuvre of Judith Butler.

In the introduction to *Interrogating Incest: Feminism, Foucault, and the Law,* Vikki Bell dedicates a few pages to briefly tracing the sociological examination of the role of interpretation in the law. Drawing off of Cohen and Scull's (1985) review of literature on deviance, Bell identifies Becker's 1963 theory of deviance as the beginning of a contemporary movement to bring questions of definition and interpretation into early sociology's macro concerns of power,

authority, and the state. She writes of Becker that his "labelling theory presented the possibility that the definitions of crime and the processes by which these definitions are policed and enforced is crucial" (Bell 1990, 8). Soon after Becker, Foucault took up many of the same questions of definition with his suggestion in both *Discipline and Punish* and *The History of Sexuality, Volume 1* that one of the primary elements of the power of the law is a discursive power that simultaneously produces knowledge and operates within those knowledges.

In setting up the feminist perspective her book gives to Foucault and the definitional power of the law, Bell pays particular attention to Carol Smart, who takes a Foucaultian approach to critiquing both Foucault and law itself, arguing for a de-centralization of the law in feminist theory and activism alike, on the basis that its centralization as a location of power would cease without the constant re-centralization through our acceptance of its self-definition. Bell writes of Smart that she "regards the law as a discourse which has a privileged position from which to exercise power. Within the parameters of the legal method, the law 'is able to refute and disregard alternative discourses and to claim a special place in the definition of events' (Smart 1989, 162)," (Bell 1990, 10). Bell furthers this point with a graphic example:

> In a rape case, the woman's knowledge of events is only 'heard' when it touches upon what the law sees as relevant. (One might also add that the legal method can highlight aspects of the situation that the woman does not see as important in the train of events, e.g. that she knew this man before, that she had had consensual intercourse with him before, etc.) The Truth that is propounded in any particular case, therefore, is based upon a method which establishes the law's status as knowledge and the legal personnel as experts. (ibid)

The law will determine whether or not violence has occurred, and it will do so not only by interpreting the physical act according to its own constructed knowledge, but by constructing the events to be interpreted according to its own criteria for what is valid testimony and what is relevant information.

Critical Race Theory

Just as feminist theorists have sought to show how the claim of the law's objectivity is inherently rooted in the specifics of a masculine hegemonic worldview, critical race theorists strive to examine how the law both constructs, and is constructed by, hegemonic whiteness and systemic racism. In the introduction to *Critical Race Theory* (1996), Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas define critical race theory as "unified by two common interests. The first is to understand how a regime of white supremacy and its subordination of people of color have been created and maintained in America, and, in particular, to examine the relationship between that social structure and professed ideals such as 'the rule of law' and 'equal protection.' The second is a desire not merely to understand the vexed bond between law and racial power but to *change* it" (xiii). Critical race theory insists on the recognition that all legal scholarship, both produced within the legal system by practitioners and produced outside of the legal system by academics, exists under the weight of racial domination, and is often itself an important site of the reproduction and maintenance of racial domination.

One of critical race theory's primary interventions into extant scholarship on race and law is its explication and criticism of "colorblind" discourse. In the 1960s, 70s, and 80s, what Alan Freeman (1978) terms "the perpetrator perspective" of racism was rampant in progressive law schools. This perspective framed racism as intentional, concrete, acts of conscious discrimination performed by individuals. These acts of racism were viewed as irrational

aberrations in an otherwise rational, which is to say race-neutral, field of interaction in which jobs, education, and earnings are distributed meritocratically, and laws and legal arbitration function objectively. Within this conceptual framework, focus on race is itself irrational and unnecessary at best, and actively discriminatory at worst. Thus, movements towards "race-consciousness" amongst Black activists, legal practitioners, and academics were posed as *constituting racism* by insisting on the importance of racial identity in an otherwise colorblind field.

In opposition to the perpetrator perspective, critical race theory is a mode of legal analysis that begins with the assumption that all forms of legal interpretation and critique are historically and socially constructed out of the political norms of the society that produces them. As iconic of this approach, Derrick Bell's *Race, Racism, and American Law* (1970) centers racial politics as the lens through which to study legal jurisprudence, as opposed to the other way around. Having established that the legal field is not a colorblind field in which race-consciousness appears only as isolated aberrations, critical race theorists reveal the ways in which the law is "a constitutive element of race itself; in other words, how law *constructed* race. Racial power, in our view, was not simply-- or even primarily-- a product of biased decision-making on the part of judges, but instead, the sum total of the pervasive ways in which law shapes and is shaped by 'race relations' across the social plane" (Crenshaw et al, 1996, xxv).

In the past several years, the moniker of critical race theory has become a folk-devil branded onto any piece of scholarship that highlights racism as systemic, legal, or perpetuated by the American state. It is a misappropriation of the tenets of critical race theory, defined above, to apply the term to any text that examines race in the law. In the past two decades there has been a wealth of valuable research into the ways that today's racial inequality is a direct result of legal

action, tracing how the way we conceptualize race today is shaped by and through the law. Karida L. Brown (2018) explores the relationship between Blackness and the *Brown v. Board of Education* decision in her interview study of Black Appalachians; Richard Rothstein (2017) belies the myth that racial segregation is the result of self-selection on the part of individual homeowners in his history of zoning laws, and Nicole Gonzalez Van Cleve (2016), Alec Karakatsanis (2019), and Matthew Clair (2020) each reveal anti-Blackness at the heart of standard legal practices in their respective exposés of various criminal courts around the country, to name only a few excellent books from the past few years alone. Many of the central ideas of critical race theory can be found in these texts, but few scholars who are not themselves legal practitioners actively employ the term.

One particular tenet at the heart of critical race theory is its claim that the narrative of colorblindness is a legal discourse that a) actively constructs race, b) maintains and perpetuates racial inequality, and c) functions to veil racism inherent in the law. Bonilla-Silva's (2003) classic text on the 21st century as the era of colorblind racism is an important foundation for the concept, especially when paired with Picca and Feagin's *Two-Faced Racism* (2007), though neither deals specifically with the nature of law itself. Devon W. Carbado's "(E)racing the Fourth Amendment" (2002) predates the expansion of the term colorblind into its current ubiquity in the social sciences, and argues that the narrative of jurisprudence as objective, and thus colorblind, distorts the nature of constitutional elements, such as the 4th amendment, which he argues are deeply infused with anti-Black sentiment.

Following this tradition, in this dissertation I examine legal narratives in American court cases as sites of the production of race, and as performative acts necessary for the maintenance and perpetuation of state-legitimated racial domination. I pay special attention to claims of race

neutrality and the colorblind discourses that distort and attempt to obscure the very ways that they produce, and constitute, the racial state. Towards this project, cases that subvert expectations by reversing expected scripts are particularly useful for revealing the discourses that underlie legal logics. Moments in which the two most conservative justices, Scalia and Thomas, are the only two to argue against the freedom of speech rights of hate groups, when a white boy shoots *white* men at a Black Lives Matter rally and is acquitted, or when the cops who kill a Black boy are themselves Black, all offer unique sites for examining how the court constructs its claims of colorblindness in cases that nonetheless result in decisions with deeply racial consequences. These are the cases that make up the following articles.

A Semiotic Approach

Taking seriously Beck's argument that violence functions as a sign that manifests hierarchies of social order onto the body through its interpretation by observers, my analysis focuses on signs and their interpretation in the courtroom, and in particular, the processes by which certain interpretations are legitimated and become durable, while others become open to resignification over time. Following the pragmatist turn in cultural sociology, I look to semiotics, linguistic structuralism, and hermeneutics to examine discourse and its social impacts, as a way of problematizing our conception of structures and the ways in which they are variably reproduced and transformed or overthrown.

I rely on the semiotic frameworks established by Charles Sanders Peirce, J. L. Austin, John R. Searle, and Jacques Derrida. Within this framework, I am especially attuned to the concept of performative speech acts as described by Austin and Butler, and later taken up by sociologists ranging from Pierre Bourdieu to Isaac Ariail Reed. Moreover, I theorize temporality as a crucial dimension of signification that helps us understand the interplay between discursive

and performative power. Drawing from Abbott's processual sociology, Ricoeur's hermeneutic phenomenology, and Reed's dimensional approach to power, I offer a semiotic analysis, attuned to the temporal dimension of signification, of the ways in which court cases involving interpretations of violence perform racial narratives into being and sediment those narratives into predictable, durable, legal and cultural discourses.

A Note About Methods

In the early stages of research for this project I read the oral arguments and decisions for over 300 Supreme Court cases pertaining to violence and race between the Civil Rights Act of 1964 and the present, gathering cases using a snowball sampling method facilitated by the fact that all court cases cite many others for precedent. This original data collection acclimated me to the form and structure of court recordings, as well as to the citational style of the court. It also provided me with a historical framework for understanding how particular arguments developed over decades, and how particular cases became landmark decisions frequently cited in subsequent cases.

From this early data, I selected cases non-randomly. The cases at the center of the articles were selected for three distinct reasons. 1. I begin the first article with *Virginia v. Black* (2003) because the case deals explicitly with questions of semiotics, interpretation, and the lines between violence and expression. The fact pattern of the case required the court to verbalize their beliefs about the process of interpreting a sign, and explain their approach to negotiating between competing interpretations, offering insights into the processes of interpretation used in other cases. 2. The three cases discussed in "Policing Potential Violence" are well-regarded by legal theorists as landmark cases that mark significant turns in 4th amendment jurisprudence. I offer an analysis of the interpretations made in those cases and how they relate to each other, but

my identification of these cases as especially important in the history of police brutality is not a novel argument in itself. 3. Kyle Rittenhouse's trial, and Tyre Nichols' death at the hands of five Black police officers, both occurred after my defense of the proposal for this dissertation. Both offer exceptional looks into the racialized phenomena of state-sanctioned violence, and because the media coverage and legal engagement are ongoing, they offer opportunities to test the claims about temporality that I make in articles I. and IV.. Because Nichols' murder occurred only four weeks before the completion of this dissertation, and because I am, in this project, primarily concerned with analyzing court interpretations of violence rather than offering my own novel interpretation of the violence itself, I will take on a more detailed analysis of Nichols' case after the trial of the cops who beat him to death.

In each of the cases that I analyze, I performed textual analysis on the oral arguments, court verdicts, Justice opinions (in SCOTUS cases), and trial transcripts. Though only final decisions can function as legal precedent, part of my empirical argument is that the language used in the verbal discussions that take place in courtrooms reveals and performs the narratives driving both final decisions as well as action outside of the courtroom. Moreover, my analysis of court transcripts evinces that lawyers are well familiar with the arguments made by their counterparts in previous cases, and cite those arguments informally in their oral statements, even where the language of those arguments does not appear in final decisions. Thus, the lasting impact of courtroom interpretations is not limited to that used in verdicts and written decisions; oral arguments contribute significantly to the discourses that extend between cases and across time.

The Roadmap

What follows are four stand-alone articles that explore different facets of the signs and

interpretations of violence that make up and perpetuate the racial state. Because each has been prepared for journal publication individually, each contains its own literature review and self-contained argument, though reading them in conjunction with one another allows the insights established in each to contribute to the reader's understanding of subsequent cases.

In "Signs and Their Temporality: The Performative Power of Interpretation in the Supreme Court" (published in *Sociological Theory* in 2022), I examine the oral arguments in the 2003 Supreme Court case *Virginia v. Black.* The fact pattern of the case involves two distinct incidents in which large crosses were burned, one in the midst of a KKK rally, and the other on the property of a Black family. The Supreme Court asks whether the right to burn a cross is protected by the First Amendment's provision for the protection of the freedom of speech; this determination is dependent on whether the court classifies the burning of the cross as an act of speech or an act of violence. I argue that SCOTUS' discussion in this case evinces that temporality is a crucial and undertheorized dimension of interpretation. While performative power has primarily been theorized as arising in moments of dramatic change, I return to the semiotic roots of the concept, particularly in the works of Judith Butler (through Derrida and J. L. Austin), to use the generative iteration of performative power as a way to describe and explain how different speakers in this case construct competing histories of the United States by positing racial violence as either confined to the past, or ongoing into the future. While the Supreme Court is perhaps a paradigmatic site of this phenomenon in action, I posit iteration as a useful way to interrogate the relationship between interpretation, performative power, and variably durable discourses and patterns of action in any number of social structures.

In "Policing Potential Violence" (published in *New Political Science* in 2022 and as a chapter in *Violence: A Reappraisal,* forthcoming from Routledge in 2023), I trace the narrative

of "potential violence" as the justification for police use-of-force through three landmark SCOTUS cases: *Tennessee v. Garner* (1984), *Graham v. Connor* (1989), and *Scott v. Harris* (2007). These three cases reveal the historical development of the legal standard to which police use-of-force cases are held today. When combined with the cultural narratives that mark Black masculinity with the constant potential for violence, the language established in this series of cases produced a "colorblind" approach to police force that exacerbates the disproportionate use of force against Black males. I argue that the shift in legal rhetoric that centers a "reasonable officer's" perception of potential violence in an interaction forecloses discussion of racial bias in the court, while simultaneously privileging officers' implicit racial biases as a legitimated impetus to use force on the street.

This article employs the attention to citation and historical iteration that I highlight in "Signs and Their Temporality." I trace two series of interpretations through the same historical period: the transformations in the Supreme Court's interpretation of the 4th amendment as it applies to police conduct, and the cultural representations of Black masculinity as potentially violent. Tracing both discourses, one legal and one cultural, evinces that "legal" and "cultural" is a false dichotomy. Examining different moments in time produces insight into how legal interpretations simultaneously shape and are shaped by the broader "racial field of vision" in which they take place, through a series of performative acts that build off of one another to create a durable phenomenon traceable through time (Butler 1993).

"Who Has the Right to Self-Defense? What Kyle Rittenhouse's Trial Tells Us About the Racial State" offers a dramaturgical reading of Kyle Rittenhouse's 2021 trial for the murder of Joseph Rosenbaum and Anthony Huber, and the injury of Gaige Grosskreutz, at a protest against the police shooting of Jacob Blake in Kenosha, WI. Rittenhouse's defense relies on the

argument that he acted in self-defense, a right granted to him by Stand Your Ground (SYG) laws permitting the deadly use of firearms by those who reasonably fear they are in immediate danger. This argument was successful in court, and Rittenhouse was acquitted of all charges. Three of the legal arguments that produced Rittenhouse's acquittal are a) that the men he shot were "bad men" who posed a risk to civil society, b) that Rittenhouse was authorized as a quasi-agent of the state via his participation in various police cadet and first responder training programs for high schoolers, and c) that as a result of a and b, the semiautomatic rifle that Rittenhouse carried did not pose a threat of violence to the public, but the ordinary objects his victims carried-- a skateboard, a flashlight, a grocery bag containing socks and underwear-- were threatening.

Stand Your Ground laws are one legal manifestation and perpetuator of the racial disparity in state-sanctioned violence committed by civilians. Research indicates that white-on-Black gun violence increases when states establish SYG laws, and that the SYG arguments are significantly more successful in court when a) the shooter is white, and/or b) the victim is Black. Because all three of Rittenhouse's victims are white, as he is himself, the trial offers an exceptional case that evinces the "colorblind" legal narratives that are utilized to perpetuate unequal court outcomes for Blacks and whites who claim self-defense. Because Rittenhouse's trial was widely publicized and has been celebrated by many gun-advocates and alt-right organizations, it is ripe to serve as a reference point for Stand Your Ground cases in the future. Unpacking the arguments it establishes surrounding its four white male participants and highlighting how those arguments contribute to the patterns of representation of Black males in court sheds insight into the racial implications of the precedent this case sets.

Finally, "The Semiosis of Sedimentation: Applications in Pragmatist Cultural Theory"

does not present new empirical data, but instead builds on the insights gleaned from the previous three articles to offer a theory of sedimentation. Building from, and clarifying, Reed's theory of power's performative and discursive dimensions, I suggest the metaphor of sedimentation, as used by Judith Butler, Paul Ricoeur, and Nina Eliasoph, as an approach to understanding how predictable discourses (and thus, structures) are made up of acts of performative power, repeated, and cited for authority, and how changes, of various extremity, in those discourses result from performative moments of resignification. I argue that this approach strengthens our understanding of the relationship between discursive and performative power, and provides a way to explain *how* discourses are perpetuated, and how and why some experience great transformation and others remain unwaveringly durable. The concept of sedimentation is particularly apt for examining moments of potential resignification, that is, moments in which an alternative to an established interpretation arises, providing the need for the original interpretation to be upheld or overturned. Because the legal system relies on disputes over interpretation and a process of citation in which previous interpretations are referenced with the authority of precedent, the courtroom is an ideal site for illustrating sedimentation at work. However, I propose that the concept is a useful tool for pragmatist cultural theory to empirically parse the relationship between structure and action in any number of situations.

Together these articles argue that the structure of the American legal system, as rooted in interpretation and the citation of precedent, is daily binding a future of racial violence. Courtroom interpretations and decisions co-constitute our conceptions of violence and race, and function as performative acts that sediment racialized discourses so that they can be relied upon in future interpretations, both within the courtroom and out on the streets. The anti-Black sentiments that were once explicit in this country's early laws, and central to its very

constitution, have in the past six decades been obscured with colorblind language that posits the American legal system as a race-neutral arbiter of objective truth, immune from racism except as perpetuated by individual, anathematic "bad apples" in an otherwise colorblind pool of police officers, lawyers, judges, and justices. And yet, the anti-Black racial hierarchy is nonetheless infused throughout every level of the legal system we still use today, legitimated, preserved, and reproduced with each new court decision that builds upon the narratives that came before it. Though this hierarchy is not immune to the possibility of transformative resignification, it becomes more and more durable with every new court decision that cites, legitimates, and perpetuates the racist interpretations it produces.

I.
Signs and Their Temporality:
The Performative Power of Interpretation in the Supreme Court

The pragmatist turn in social theory has centered the way we use signs to make meaning out of the world around us. Increasingly, conversational analysis, and, relatedly, semiotics—the study of how the individual components of signs work together to communicate meaning—have been utilized to theorize any number of significant social phenomena, from how powerful actors make decisions in life and death situations (Gibson 2012; Vaughan1996) to the micro-interactional utilization of generalizations as a component of racism (Timmermans and Tavory 2020). A primary mode of examining signification analyzes how a sign is related to its object. Peirce (1991) describes three ways a sign might be related to its object: as an icon, through some resemblance to the object; as an index, through a "correspondence in fact," or as a symbol, which is attached to its object only by habitual convention. However, signs are not only attached to their objects according to these categories of signification; they also communicate relations of *time.*

Feminist and queer theory has been the site of much generative theorization of how time, and our individual perceptions of time, are influential to experiences of embodiment and domination (Freeman 2010; Gallop 2018; Muñoz 2009). This approach acknowledges a symbolic dimension of time that is constantly referenced, and created, through daily interaction (Munn 1992). Analyzing how people understand time is interwoven with how they understand and interpret other signs, with significant effects for interactions. For example, how college students interpret and navigate various signs of sexual consent is related to "calendar time" (Is it Greek-life Homecoming season?), "relationship time" (Have these partners been dating for several months, or known each other for less than a week?), and "sexual time" (Have they

already been making out for the past hour?) (Chin et al. 2019). Since the early 1990s, there has been an uptick in social theories of time (Flaherty 1999), especially oriented to the future, and the anticipation and production of shared futures (Adam 1990; Bergmann 1992; Mische 2009; Tavory and Eliasoph 2013).

Using Peirce's semiotic vocabulary, I demonstrate how dramatically different interpretations of a sign result from differing understandings of the sign's influence on the past, present, and future. Using the oral arguments from a Supreme Court case involving cross burning, I analyze a particularly dramatic example where temporality is central to the interpretation of a single sign (the burning cross) in a situation where the results of varied interpretations have especially widespread and long-standing effects. I engage the generative literatures on eventness (Sewell 1996; Wagner-Pacifici 2000, 2010, 2017) and dimensions of power (Lukes 2007; Reed 2013) to argue that interpretations about time often have a performative dimension. Acts of interpretation in certain structural settings, like the Supreme Court of the United States, are of special significance in part because such settings are tied by practical, institutional mechanisms to any number of modes of force (e.g., an armed police force, the military) and produce considerable effects.

In what follows, I present the 2003 Supreme Court case *Virginia v. Black,* and explain the theoretical significance of this case. I provide a textual analysis of the oral argumentation of *Virginia v. Black,* examining how different legal parties interpret the burning cross variably as an *icon, symbol,* or *index* according to their understanding of the sign's past, present, and future. The disagreements between Justices and councils in this case evince the importance of a temporal element of signification at play when subjects interpret the meaning of signs. I then turn to the differing interpretants produced for the burning cross, that is, the sign's effect in the world.

I engage Wagner-Pacifici's theory of the event as an ongoing performative endeavor to argue that courtroom interpretations of time function to construct and perpetuate a specific narrative of the arc of racial violence through the past, present, and future. Finally, I highlight some theoretical and empirical utilities for the careful analysis of signification's temporal dimension. Following Bourdieu, Timmermans and Tavory's (2020:311) observation that "power predetermines semiotic manifestations and permeates interactional dynamics" is an important and necessary addition to strictly semiotic approaches to relationships. Taking into consideration Reed's (2013) theory of power as cause, with a performative dimension in addition to its relational and discursive dimensions, the semiotics of interaction play an important role in continually *creating and solidifying* structural power, even in moments of resignification. I argue that this semiotics often has a temporal dimension central to its ability to perform this iterative function.

Case and Theoretical Reasoning

Virginia v. Black

Heard during the 2002 session of the Supreme Court of the United States (SCOTUS), *Virginia v. Black* combines two cases that originally appeared before the Virginia Supreme Court. The primary case involves respondent Mr. Black, who led a Ku Klux Klan (KKK) rally at which a 30-foot cross was burned on private property, clearly visible from the nearby state highway. Mr. Black's stated motivation was that he had heard interracial couples had been holding hands on the sidewalk in the county where the rally took place. During the rally, both before and during the burning of the cross, Mr. Black and others present were heard speaking loudly about "taking a .30/.30 and randomly shooting blacks" (*Virginia v. Black* 6). In the second case, two men burned a cross on the private lawn of their African American neighbors, after a

dispute in which the neighbors called the police to file a noise complaint. All three respondents were found guilty under Virginia statute § 18.2-42, which mandates, "It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway, or other public place. Any person who shall violate any provision of this section shall be guilty of a class six felony. Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons."

These convictions were contested, first in the Virginia Supreme Court, and then in front of SCOTUS, on the basis that (1) the prima facie clause is unconstitutional in that it restricts the burning of a cross as a means of expressing a viewpoint rather than for the purpose of intimidating a person or groups of persons, (2) the jury in the original Black trial was instructed that the burning of the cross at all could be considered sufficient evidence of the required "intent to intimidate," and (3) the Virginia statute was indistinguishable from the ordinance found to be unconstitutional in *R.A.V. v. St. Paul* (in which an ordinance prohibiting cross burning was overruled on the basis that it unduly singled out cross burning for the purpose of intimidating racial minorities as the unsavory message to be prohibited, distinct from any number of other intimidating acts). Ultimately, the Court held that the Virginia statute was unconstitutional as written, on a 7–2 majority, with the majority opinion penned by Justice O'Connor (Scalia and Thomas dissenting, in part and in full, respectively).

I chose *Virginia v. Black* for my analysis for several reasons. First, *Virginia v. Black* is a useful illustration of how the temporal mode of signification affects interpretation. Court cases writ large, and Supreme Court cases especially, are rich sites for analyzing the ways meanings are made between signs, their objects, and the interpreting subjects, because of their practical

structure: in a Supreme Court case, each party gives a clear account of how they are interpreting a given sign, and why. Thus, the courtroom involves the explicit articulation of the process of interpretation in much more detail than in most social situations. *Virginia v. Black,* in particular, is an especially apt court case for examining how subjects read temporality onto signs, because the sign of the burning cross is read as temporally ambiguous—the parties at play in the case variably understand the cross's significance in the past, the present, and the future.

Furthermore, the specific micro-interactional debates about the meaning of the burning cross reflect (and produce) very different understandings of the history, and future, of racial violence. Interpretations of the cross reveal differing claims about whether racial violence continues to be an ongoing problem in the United States, or whether today's racism is primarily ideological as opposed to physical (that the two are distinct is an interpretative claim in itself).

Because of its institutional location, the interpretations made in the Supreme Court are of more practical significance than those made around the table in an undergraduate seminar, or between strangers in the grocery store. *Virginia v. Black* rose to the SCOTUS level because the Commonwealth of Virginia had a statute identifying cross burning as an act of intimidation, and prohibiting its usage in that context. When members of the KKK brought the statute to court, the Virginia Supreme Court ruled in their favor, declaring the statute unconstitutional. The SCOTUS decision that followed, which has not been overturned in the years since, permits cross burning in a number of settings and for a number of purposes. Given its structural power, the Supreme Court case determined whether certain forms of cross burning would continue to be legitimate and legal acts in the future, or whether they would be prosecuted and thus contained, at least as legally legitimate acts, in the past. This is a significant event in the country's racial field.

Finally, a Supreme Court case, and specifically this Supreme Court case, is an ideal location for analyzing the performative dimension of power, and theorizing its interaction with relational and discursive power. The institutional logic of the Supreme Court is one of citationality: arguments made over generations build on each other so that interpretations made in past cases can be reasonably expected to persist in related cases into the future, unless the Court produces a new interpretation that overturns its previous ruling and resignifies the sign at hand. SCOTUS decisions have a performative dimension that can produce or perpetuate narratives of history, as well as continually reconstitute and solidify the Court's structural and discursive power over the future. With every decision, the Court re-establishes the primacy of its own interpretations, enforced by its institutional relationship to various means of physical force (e.g., armed police forces, prison buildings), and propels those interpretations into the future, where they can only be resignified by a new decision of the Court itself. In *Virginia v. Black,* interpretations about the temporality of the burning cross reflect and recreate legal narratives about the temporality of racial violence, and affirm the durability of the Supreme Court's interpretive authority over these narratives.

Initial Semiotic Vocabulary

In performing the textual analysis of *Virginia v. Black,* I made an effort to keep my language as colloquial as possible, to avoid the terminological quagmire that semiotic theorization risks becoming. This is also because my argument in the textual analysis section is that the primary semiotic categories currently in use do not, in themselves, fully capture the temporal element of signification that I am trying to elucidate. Nonetheless, an initial semiotic

vocabulary is necessary for describing and distinguishing the various kinds of signification at play in the court case. (For a more extensive explication, see Timmermans and Tavory 2020.)

Peirce's (1991) semiotic framework separates instances of meaning-making into three parts: the sign, which gestures toward its object but does not fully capture it in entirety; the object, which is the thing signified by the sign; and the interpretant, which is the way the sign is taken up, its effect. From this basic triad, numerous types of signification are possible. Peirce differentiates between three categories of sign, as well as three modalities of interpretant.

Depending on its relationship to its object, a sign can be a *symbol,* an *icon,* or an *index.* A symbol is related to its object only as a result of a patterned history connecting the two. It does not necessarily resemble its object in any tangible way—a symbol is arbitrary except for its reliable connection to its object over time. An example of a symbol is the swastika, whose object might be Naziism. An icon shares some recognizable traits of its object and thus less arbitrarily portrays some feature of the object. For example, a yellow sign featuring a right triangle is an icon for a steeply inclining road. Onomatopoeias like "sizzle" or "slap," which audibly recreate the sounds they describe, are icons. Most other words are, by themselves, symbols, arbitrarily connected to the things they signify. Finally, an index is related to its object by co-existence—the very fact of the index indicates its object's existence. Thus, horse droppings are an index for a horse, or smoke is an index for fire.

Peirce notes three modalities of interpretant—the way a sign is taken up, or, *how* it means—an *initial interpretant,* a *dynamic interpretant,* and a *final interpretant.*[1] The initial interpretant is the meaning the sign always has a potential to produce. The dynamic interpretant

[1] In other parts of his papers, Peirce uses different terminology to describe the categories of interpretant. In this article, I will exclusively refer to the immediate, dynamic, and final interpretants, which is the triad that appears most frequently throughout Peirce's work (Fitzgerald 1966; Liszka 1990).

is the actual effect of the sign, such as the experience of and reaction to the sign by one who witnesses it. And, the final interpretant is the effect the sign would have if it were fully completed, that is, if conditions of perfect communication existed such that the recipient of the sign understood exactly the entire meaning expressed by the sign.

Peirce's framework as written is an extremely useful set of categorizations for distinguishing between some of the positions held by actors in *Virginia v. Black.* However, Peirce describes no categories directly distinguishing relationships of time. Smoke is an index for fire whether it is the billowing smoke currently being produced by an active fire, or the smoke that hangs low over California days after a wildfire has been extinguished. The category of final interpretant leaves room for such questions of a sign's temporality to be resolved through completed communication, but this is necessarily unattainable in real-life instances, as it requires the navigation of any number of follow-up questions about the sign, each of which produces its own subsequent signs whose complete meaning must be negotiated, and so on.[2] In *Theorizing the Standoff: Contingency in Action,* Wagner-Pacifici (2000:63) writes that "it is thus always important to ascertain the specific types of time-consciousness and time-orientation that the particular protagonists bring to the standoff as they tend to assume different discursive tense formations and narrative temporalities." A court case shares many of the discursive characteristics of the standoffs Wagner-Pacifici describes, not least among them the importance of how the opposing parties understand *time.* This article examines how actors' time-consciousness and narrative temporalities affect their interpretations of signs, and vice-versa. In the following section I take *Virginia v. Black* as an exemplary case for analyzing the role of temporal semiotics in the interpretation of a single sign (the burning cross).

[2] For examples of how other semioticians have added to Peirce's vocabulary to account for signs to which temporality is especially integral, see Langer 1914; Rappaport 1999.

Reading Temporality onto the Burning Cross

An icon *for a predictable future*

One of the reasons *Virginia v. Black* is a particularly useful case for examining the temporal element of signification is that it features a disagreement about what an understood historical past means for the present and for the future. The parties involved in this disagreement are the Supreme Court Justices and two primary lawyers: Mr. Hurd, on behalf of the Commonwealth of Virginia (petitioner), and Mr. Smolla, on behalf of the man accused of burning the cross (Mr. Black, respondent). Both Hurd and Smolla spend the majority of their floor time arguing that the 100-year history of the burning cross and its usage by the KKK is important for understanding the cross's significance, but they come to opposing conclusions about what this semiotic inference implies about the constitutionality of the act in question.

Hurd gives an especially clear description of the historical process by which the burning cross acquired its cultural and legal significance. One of Hurd's primary positions is that as a result of its historical use, the burning cross as a sign is entirely unique in its function, meaning, and scope of reasonable interpretation; any comparison to other symbols and words will thus be imprecise. This point is of legal significance because one element of the debate over the Virginia statute is whether the same problematic actions could be banned just as easily by a broader statute proscribing threats or intimidations of all forms. That is, because banning a specific symbol raises questions of viewpoint-censorship, the question is whether the First Amendment concern might be resolved by a less specific statute. To this point, Hurd cedes that indeed acts of cross burning can, and have been, convicted on the basis of less-specific federal statutes against fighting words. However, he states that the burning cross is "a symbol like no other; and so this

is a self-contained category" (Justice Ginsburg, questioning Mr. Hurd, 14), arguing that this uniqueness justifies and indeed requires specialized interpretation and legislation.

The burning cross occupies this legal niche because it exists at the intersection of situations that are handled differently in the courts. On the one hand, it is a physical act, with certain risks and legal properties associated with its physicality. The burning cross purely as an image is not what is being discussed—clearly, hanging a paper poster in one's yard on which a picture of a burning cross is printed will not elicit the same effect as a wooden cross doused in kerosene and set ablaze. At the same time, the burning cross contains a religious icon, which, when unburned, cannot be constitutionally banned. Finally, the burning cross can be understood as a speech act that ought to be considered in the same way that words are considered under the First Amendment.

Because the burning cross is a physical symbol, not merely a spoken word, and because it is not just a symbol, but an act that alters or reverses the original meaning of the symbol when not acted upon, it does not clearly fall into any of the legal categories used for cases that appear to have some similarity. Certainly, cross burning is not the only case in which an action or a symbol has been brought before the Supreme Court for questions about constitutionality under the First Amendment— there is an entire category of acts termed "symbolic speech" that involves acts and symbols to be considered as speech by the court. In such cases, the normal course of action is to apply the "O'Brien Test," emanating from *United States v. O'Brien* (1966), in which David Paul O'Brien and three others burned their draft cards on the steps of a Boston courthouse to protest the Vietnam war. The Court ruled 7–1 against O'Brien, arguing that the First Amendment cannot be used to protect a seemingly limitless category of acts that could potentially be labeled "symbolic speech." As a result, in future cases, symbolic speech may be

proscribed by laws that are (1) constitutional and (2) further a significant government interest that is both content neutral and prohibits no more speech than is essential to further the interest being protected. In O'Brien's case, it was determined that his freedom of speech was not being proscribed; rather, the government had a constitutionally protected interest in preserving the physical and administrative functionality of draft cards.

However, Hurd points out that the O'Brien test is not straightforward in the case of cross burning, because the object being burned has no utility beyond its function as a sign. He gives a clear explanation of his interpretation of the sign, gesturing to its history of use as a means of validating the interpretant he produced, which is that the burning cross's object is a threat of racialized physical violence:

> [The burning cross] deliberately invokes the precedent of 87 years of cross-burning as a tool of intimidation. Burn anything else—burn the flag, burn a sheet. The message is opposition to the thing that the symbol unburned represents. Burning a cross is not opposition to Christianity. The message is a threat of bodily harm, and it, it is unique. And it's not simply a message of bigotry. It's a message that whoever has it in their hands, a message that bodily harm is coming. That is the primary message.

Here, Hurd emphasizes that the burning cross does not communicate its meaning according to the pattern of other signs. In most cases of symbol burning, "the message is opposition to the thing that the symbol unburned represents": a burning flag signifies opposition to a country and its government; a burning draft card signifies opposition to military recruiting or war. However, because a burning cross does *not* communicate opposition to Christianity, its significance can only be surmised from the specifics of its historical usage. Hurd points to the history of the burning cross as evidence for the way it means in the present.

The temporal components of Hurd's position reveal the inner semiotic mechanism of his argument. When faced with a sign whose significance is under debate, Hurd turns to past appearances of that sign and describes the significance it had in the past. By highlighting the

specificity of the meaning that was attached to the sign through its repeated, intentional use in a litany of similar events over the course of decades, Hurd constructs a cohesive history of significance to insist that the sign's present meaning can only be understood as the continuity of its past. In presenting the relationship between the sign's past and its present as one of linear continuity, Hurd argues that the logical prediction of the sign's meaning for the future is the same as its meaning in the past. That is, if repeated instances of racial violence in conjunction with the burning cross in the past solidified the cross's significance as a threat of imminent violence, then present appearances of the burning cross can likewise be reasonably interpreted as threats of imminent violence.

Hurd's argument positions the sign of the burning cross as an *icon,* with one primary object—the threat of racial violence—which it represents through visual similarity to the signs created, repeatedly, through many previous instances of racial violence throughout post-Civil-War U.S. history. He argues that the KKK has imbued the burning cross with the iconic significance of imminent physical violence through decades of repeating a sequence of events whereby racist epithets and verbal threats are paired with a cross burning, which is immediately followed by physical violence such as beating, tarring-and-feathering, lynching, and so on. The burning cross thus represents a precursor to imminent violence in this sequence, which he argues is iconically invoked by the visual similarity of subsequent appearances of the burning cross (with the exception of appearances in venues like a theater or a movie set, where the social setting preestablishes the sign as a "reference to" rather than a "usage of").

Hurd argues that the decades of a burning cross being utilized in conjunction with the heinous violence perpetrated by the Klan throughout the past century has written the meaning of

the burning cross for the average citizen, very intentionally over time, so that it has become a well-recognized sign of brutal violence and murder:

> The fundamental message is a threat of bodily harm. And this is not something that we just made up. Cross-burning *has that message because for decades they wanted it to have that message, because they wanted that tool of intimidation.* And so it rings a little hollow when the Klan comes to court and complains that our law treats that message—treats that burning cross as *having exactly the message that they for decades have wanted it to have* [emphasis added]. (17)

The fact that the burning cross does not in any register appear to symbolize opposition to Christianity indicates that a process of in-depth, intentional resignification took place over the course of decades, as the KKK paired physical violence with the "calling card" of the burning cross, so that the latter became a predictable sign for the former.

This idea of predictability is central to Hurd's argument, because it allows him to shift the legal focus to concerns about violence in the *future*. The Court's majority opinion includes a six-page written history of the burning cross, describing numerous occurrences in the twentieth century, most of them concurring with acts of heinous violence: "by September 1921, the *New York World* newspaper documented 152 acts of Klan violence, including 4 murders, 41 floggings, and 27 tar-and-featherings" (8). The opinion also notes several instances in which the Klan's speech and actions made explicit their use of the burning cross as an immediate threat of impending violence. For example, "after one cross burning at a synagogue, a Klan member noted that if the cross burning did not 'shut the Jews up, we'll cut a few throats and see what happens'" (9).

Hurd's primary interpretation of the burning cross is that this history indicates that its use signifies a prediction about the future: "[I]t is the symbol that the Klan has used to threaten bodily harm. The connection, if you will, in our history is between the burning cross and ensuing violence"; it communicates that "we're close at hand. We don't just talk. We act" (15). Hurd

understands the history of the cross and its co-occurrence with physical violence to have established the burning cross as a sign with a future-oriented object. A cross burned in public is a promise, threat, or prediction about bodily harm that may or may not end up actually occurring, as threatened, in the future. As a result, Hurd argues that the correct legal classification for a burning cross is "fighting words," which is a category of speech acts excepted from protection by the First Amendment, because they offer a prediction about physical violence in the future.

A symbol *of a varied past*

Mr. Smolla, the opposing counsel, agrees with Hurd that the history of the burning cross has transformed its realm of reasonable significance from "opposition to Christianity," to "relationship to the KKK." But, Smolla counters Hurd's argument about the cross's unique signification, suggesting that its proscribable qualities ought to be compared to other physical threats, rather than to signs of ideology. This would shift the legal precedent relevant to this case so that the burden of proof lies on the prosecution to show that the specific burning object at hand poses immediate danger as a result of its physical qualities—proof that does not exist in the fact pattern of Mr. Black's situation. Smolla asks, "What would be the difference between brandishing a torch and brandishing a [burning] cross?" Here, Justice Kennedy jumps in with an answer, corroborating Hurd's point about the historical specificity of the sign: "100 years, 100 years of history," to the extensive laughter of the courtroom.

Kennedy's comment is met with laughter precisely because it seems obvious that a sign's history of repeated use is how it comes to be imbued with predictable significance. Brandishing a torch has no explicit meaning in the zeitgeist of 2003 United States (although perhaps it does now, after Charlottesville in August 2017) (Krause 2019), but brandishing a burning cross has obtained a very specific meaning over the course of the past 140 years. The overwhelming

history of the burning cross, in the United States at least, is monopolized by its usage by the KKK and their sympathizers.

Smolla utilizes this history very differently from Hurd, and thus comes to an entirely different conclusion about what the cross signifies. Smolla's primary argument is that the Court ought to take more seriously the entirety of the burning cross's history, rather than accept Hurd's insistence that its common connotation is that derived from its most extreme usages (those related to physical violence). This argument is highlighted in an early exchange between Smolla and Justice Souter. To begin, Smolla states:

> A core element of our argument is that there is a fundamental First Amendment difference between brandishing a cross and brandishing a gun. The physical properties of the gun as a weapon add potency to the threat. . . . But the properties of the cross are not physical properties, and the burning element of a burning cross is not what communicates the threat. (28)

This line of reasoning is immediately questioned by Souter, who asks: "How does your argument account for the fact that the cross has acquired a potency which I would suppose is at least as equal to that of the gun?" (28). To which Smolla replies: "Justice Souter, I think that our argument is that in fact it works the reverse way, that what the cross and the burning cross have acquired as a kind of secondary message . . . are a multiplicity of messages."

In this exchange, Smolla begins by alluding to the O'Brien test, arguing that a brandished gun is primarily a practical object whose physical properties threaten the interests of the state, namely the interest to prevent its citizens from being shot at the hands of other citizens. In contrast, he argues, a burning cross usually has no physical or utilitarian attributes that extend beyond its existence as a symbol. Perhaps this would be different if there were an extensive history of burning crosses being swung as weapons to bludgeon people, or if they were used to set fire to people's homes, but this is not the case. As a result, Smolla argues, the gun passes the

O'Brien test and can be proscribed (at least insofar as the First Amendment is concerned) because it has a violent utility and threatens a violent future; the burning cross, in contrast, fails the test and cannot be proscribed, because it has no intrinsic property of utility, violent or otherwise, and thus does not (in itself, barring extraordinary circumstances) indicate the likelihood of any predictable future action.

The temporal significance of the burning cross functions differently in Smolla's argument than in Hurd's. Smolla concedes that in many past instances, the burning cross immediately preceded acts of racial violence. However, he contests the notion that such examples of co-occurrence constitute a predictable pattern in which the burning cross automatically signals impending violence. He points to the fact that, even at the height of the KKK's dominance in the early 1900s, crosses were burned on a number of occasions that did not result in violence. Smolla argues that such instances disrupt the possibility of a logical pairing between the burning cross and the threat of imminent violence.

In other words, when faced with a sign whose meaning is disputed, Smolla constructs a history of varied usages and thus varied meanings, impeding the ability to trace continuity between the sign's past meanings and a singular meaning in the present. By arguing a lack of clear continuity between multiplicitous past and present meanings, he places the burden of proof for the significance of any given appearance of the sign on the specifics of that sign's *present* circumstances. He thus insists that no reasonable prediction about the sign's meaning for the future (i.e., whether violence will be imminent) is possible solely on the basis of reference to past occurrences of the sign that did indeed result in such a future.

Smolla's argument positions the burning cross as a *symbol,* invoking the KKK and its ideology and history of actions through a symbolic connection established by the sign's near-

exclusive use by the KKK throughout its history. Smolla argues that the cross is not related to its object through any direct representation of a specific act, but rather invokes its object through cultural reference to a long history of varied usage by one specific group. As a result, its object can only really be understood as a reference to the KKK, generally speaking, rather than the threat of specific acts.

Hurd and Smolla disagree about whether the object of the sign of the burning cross has any coherent future orientation. Hurd uses the sign's historical connection to violent actions to propose that predicting future violence is a reasonable interpretation of the burning cross. Smolla draws a different connecting line between the sign's history and its indicated future. He argues that because the cross has not *always* been used as a precursor to violence, but has been used in all kinds of ways, including as a non-physically-violent symbol for the Klan's racist ideology, it cannot reasonably be used to make any predictions about the future. Rather than being solidified as an active threat, he argues, the long history of the symbol has given it not one clear message, but a multitude of messages. For this reason, any statute that bans the burning of a cross for the purpose of an active threat of bodily harm (which he concedes can be constitutionally proscribed), risks having a chilling effect on the many other reasons one might burn a cross—meanings, he argues, that have been woven into the history of the sign via the numerous examples of crosses being burned at KKK rallies where no immediate physical violence occurred.

Ultimately, Souter, who precipitated the comparison between the cross and the gun, is convinced by Smolla's argument, and the Court majority ultimately sides with this position. In his own opinion, joined by Ginsburg and Kennedy, Souter writes:

> To be sure, that content often includes an essentially intimidating message, that the cross burner will harm the victim, most probably in a physical way, given the historical

> identification of burning a cross with arson, beating, and lynching. But even when the symbolic act is meant to terrify, a burning cross may carry a further, ideological message of white Protestant supremacy. The ideological message not only accompanies many threatening uses of the symbol, but is also expressed when a burning cross is not used to threaten but merely to symbolize the supremacist ideology and the solidarity of those who espouse it.

Souter's comments foreshadow a significant element of the majority decision: the multiplicitous meanings of the symbol are such that some interpretations are constitutionally proscribable (active threat, intent to intimidate), whereas others are protected by the First Amendment (express unity for white supremacists; hatred of racial minorities). But, these meanings are indistinguishable in the physical object itself. That is, a cross burned as a threat is visually identical to a cross burned as an expression of hate. This is the matter at stake in the prima facie clause of the Virginia statute. The jury in the Black case was instructed that the prima facie clause could be taken to mean "the burning of the cross itself is sufficient evidence from which you may infer the required intent." Assuming there are multiple possible interpretations of the sign of the burning cross, the prima facie clause makes them indistinguishable. Smolla, and the Court's majority decision, thus find the prima facie clause unconstitutional, because it interprets the same predictable future (physical violence) from different historical usages of the sign (use in conjunction with a lynching or beating, versus use at a non-physically-violent, ideology-based rally).

An index *of terror in the present*

In addition to the debate between Hurd and Smolla, Souter, and the court majority over the burning cross's future-orientation, there is one more temporal interpretation of the sign at play in the Court. Justices Scalia and Thomas both agree, though to differing degrees, with Hurd's future-oriented interpretation of the cross. However, they argue (in slightly different ways) that the disagreement about what the sign indicates about the future is, legally, more or

less irrelevant, because that potential meaning is superseded by the significance of the burning cross in the *present.*

During the exchange between Smolla and Souter, Scalia intervenes and asks: “Isn’t it not merely a, a trademark that has acquired meaning? Isn’t it also a kind of Pavlovian signal so that when that signal is given, the natural human response is not recognition of a message, but of fear?” (29). Here, Scalia acknowledges the importance of the sign’s history (“acquired meaning”), and that one possible response to the sign is to look for its intended significance, whether in the past or the future (“recognition of a message”). However, he shifts the primary interpretant of the sign of the burning cross into the present by suggesting that the cross evokes a Pavlovian response, that is, the instantaneous experience of fear, in the present. He says, “the State can, in fact, prevent threats that scare people reasonably—for their own safety, this is in a separate category from simply a, a symbol that has acquired a potent meaning. . . . The whole purpose of that is, is to terrorize” (29–31). In this interpretation, while the sign qua threat invokes a future of violence, Scalia argues that regardless of whether that future can be reasonably predicted to come to fruition, the *present fear,* or experience of terrorization, is in and of itself reason enough for prohibition of the sign. That is, regardless of what kind of sign the cross is intended to be, it is being taken up as a terrorization and as a threat.

Similarly, Thomas appeals to terrorization as a present experience of increased heart rate, sweating, muscle aches, tunnel vision, and so on. In his dissent, Thomas writes that “in our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.” He makes this point explicit by quoting from the fact pattern in another case, *United States v. Skillman* (1990, 4):

> After the mother saw the burning cross, she was crying on her knees in the living room. [She] felt feelings of frustration and intimidation and feared for her husband’s life. She

> testified what the burning cross symbolized to her as a black American: "murder, hanging, rape, lynching. Just about anything bad that you can name. It is the worst thing that can happen to a person."

Like Scalia (and Hurd), Thomas acknowledges the possibilities for future-oriented interpretations of the sign, but argues that the burning cross is also an *index* whose object is in the present—a terrorization intended to produce all the horrible physical and psychological symptoms of extreme fear. The woman he describes as crying on her knees in fear and intimidation is not simply anticipating the possibility of some future trauma, she is, *in the present,* experiencing the bodily harm (falling to knees, crying, trembling) of the *current terrorization* of the burning cross.

Moreover, Thomas disagrees with Smolla and the majority opinion that the burning cross is only referencing an ideology whose violence is confined to the past and cannot reasonably be used to predict violence in the future. Rather, he argues that much of the sign's traumatic power comes from the way it collapses the past into the present. His quote from *Skillman* hints at this temporal blurring: the trauma invoked by the burning cross is not just an echo of the terror many Black people experienced during Jim Crow, but rather a *renewal* of that terror. It is in this sense that Thomas refers to the victims of a cross burning: he sees the burning cross as producing the interpretant of physical violence and intimidating terrorization in the lived experiences of those for whom the cross was intended.

Thomas's approach to the temporality of the sign's significance attempts to side-step Smolla's insistence that the interpretation of the cross as a sign for a predictable future is not possible on the basis of its past. Thomas argues that whether or not the sign can be understood as predicting a violent future is legally irrelevant, so long as there is proof that it is doing proscribable harm (causing significant distress and fear) in the present. Thomas harnesses the

sign's history differently than either Hurd or Smolla. Instead of using an established history of the sign to make a claim about the future, as Hurd does, Thomas argues that history binds to the burning cross a present signification of terror and intimidation that does not necessitate any reasonable prediction about the future in order to be constitutionally proscribed.

Positioning the Court Case in Time

The previous section illustrates the role of interpretations of temporality in the process of meaning-making: while the various legal parties attribute different relationships between sign and object to the burning cross, these differences in interpretation can be understood through the varying ways participants draw connecting lines between past, present, and future. Though an analysis of the temporal semiotics taking place inside the courtroom is useful for explaining *how* varying interpretations of the burning cross are constructed, this micro-interactional process is only one dimension of *Virginia v. Black's* significance. In this section, I focus on how the legal parties' varying interpretants for the burning cross, rooted in time, are affected by past interpretations and expectations about the future, and, in turn, come to shape both past and future.

The temporal interpretations that take place within the Supreme Court chambers are bounded by the structural specifics of the institutional context. That these are not discussions between two civilians in line at the grocery store is crucial not only for the weight of the effects produced by the interpretations—the resulting SCOTUS decision will transform laws determining how police officers are allowed to respond to a mob burning a cross—but also for the role of previous interpretations in shaping the discussion. At any specific moment, a given sign does not have an infinite number of possible interpretants. The range of possible interpretants is variable and always changing, but also always limited by previous interpretations

of that sign. Peirce highlights this characteristic by stressing that signs and interpretations are *dynamic,* taking place in a long chain of one producing another, over and over.

The institutional structure of the Supreme Court is a (perhaps paradigmatic) manifestation of this process. The court system as a whole relies on a legal logic that is inherently citational. The court draws on arguments, interpretations, and decisions made in previous cases to make sense of the case in front of them. In the lower courts, this citationality frequently functions as a rote process of referencing past cases as justification for making the same interpretations in present cases. The role of the Supreme Court, however, is to make interpretations in moments where predictable meaning-making has ruptured. For a case to reach the Supreme Court, there has to be a significant dispute over an interpretation of a given situation made in the lower courts. That is, cases approach the Supreme Court when an attempt at resignification—whether of a sign, a law, or a previous court ruling—has taken place. The purpose of a SCOTUS case is thus to validate or invalidate previous interpretations—whether the facts of a case, the implications of a cited decision, a law at hand, or (frequently) the Constitution—in moments of disputed signification.

Recent theorizations of meaning-making in such moments of rupture and resignification offer fruitful insights for understanding processes of interpretation. Broadly, there are two primary risks in assessing such moments of potential change: either the interaction is vested with too much instrumental autonomy and the structures and histories that affect what is open to interpretation are ignored; or, the significance of the creative potential of the interaction is dismissed in favor of modeling the stringent perpetuation of existing structures, which fails to give a satisfactory account of moments of resignification and social change. Just as there is risk in failing to account for structural influences on the interaction at hand, such as Justice Thomas's

Blackness in a country that has long collapsed the effects of racism into the signifiers of race (Fields and Fields 2014),[3] there is risk in overdetermining the possible outcomes of courtroom interpretations by imbuing them with cultural imperatives (Vaughan 1996) that posit them as inevitable moments in robust long-term trends (Collins 2004, 2007). Useful middle-ground solutions have attended to the importance of temporality, whether by focusing on temporal ordinality as a determinant for what kinds of interpretations are possible (Slez and Levi-Martin 2007), theorizing the role of future anticipation in interactions (Tavory 2018; Tavory and Eliasoph 2013), or centering the conversational analysis methods of microcontingency while actively positioning them within broader temporal contexts (Gibson 2012; Wagner-Pacifici 2000).

Virginia v. Black comes to the Supreme Court at a moment of potential resignification for the legal status of the burning cross. Prior to this case, instances involving cross burning were adjudicated according to legal narratives about the freedom of speech.[4] However, in *Virginia v. Black,* Virginia's lawyers open a new landscape of possible significations by asking whether the burning cross predicts (or performs) *violence.* Part of the reason for this shift can be found in the linguistic specificity of the Virginia statute: the statute permits any number of forms of unsavory speech, but prohibits the burning of a cross with the *intent to intimidate.* This shifts the register of the debate from being over a category of speech that is particularly odious (protected) to the

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[3] It is no coincidence that Justice Thomas makes the strongest claim for terrorization as the primary interpretant of the sign of the burning cross. Thomas speaks to the experiential trauma of witnessing a burning cross while Black in America, an appeal to pathos that only one other Justice (Scalia) even approximates. This is not to claim that Thomas is a paragon of Black experience and thus has personal access to a category of interpretation out of reach to the non-Black Justices. However, that the bench's one Black Justice interprets the burning cross as a very *present* terrorization when the others do not is one small piece of evidence for how racial epistemologies of ignorance (Sullivan and Tuana 2007) inflect the field of interpretation in the courtroom.

[4] This is most clear in the frequent references made to *R.A.V. v. St. Paul* (1992), wherein a City of St. Paul ordinance prohibiting "the display of a symbol which arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender" was unanimously declared an unconstitutional violation of the First Amendment.

category of fighting words (unprotected). This subtle shift opens the ground for Hurd (on behalf of Virginia) to establish the argument that a burning cross can be reasonably interpreted as an active threat.

In moments of contested signification, that is, moments that offer the possibility for a prominent sign to be resignified, understandings about the sign's past, present, and future become hotly contested sites of dispute, leveraged toward the desired outcome of establishing a new meaning for the sign in the future. The semiotics of how actors in the courtroom use arguments about time to insist on specific interpretations of a sign is an important dimension of the process by which a sign undergoes legal resignification (or faces the possibility of resignification, even if its original legal meaning ultimately prevails).

Such significations cannot be dismissed as minor conversational discrepancies—just as various, ongoing, discursive developments constructed what we now think of cohesively as "9/11," with incredible cultural, political, and military ramifications (Wagner-Pacifici 2017), so too can we see the various claims made about time in *Virginia v. Black* as part of the active structuring and restructuring of the timeline of racial violence in the United States.

To begin to unpack how this process functions, we can turn to a news article Thomas quotes in his written dissent, which captures the performative tension between narratives of what is past versus accounts of what is very much still present. In a long list of news coverage detailing cross burnings in the Commonwealth of Virginia in the post-WWII period, Thomas references a 1951 story from the *Richmond Times-Dispatch,* writing that "the crosses burned near residences were about five to six feet tall; while a 'huge cross reminiscent of the Ku Klux Klan days' burned 'atop a hill' as part of the initiation ceremony of the secret organization of the Knights of the Kavaliers, was twelve feet tall." Only a few months later, in February 1952,

Virginia Governor Battle announced that "Virginia might well consider passing legislation to restrict the activities of the Ku Klux Klan." Put another way, mere months before the Virginia Governor was concerned enough to publicly suggest restrictions on the KKK, while a 12-foot cross burned at the initiation ceremony of a racist brotherhood and multiple smaller crosses burned on the front lawns of Black families living in Richmond, one of the city's prominent newspapers considered the "Ku Klux Klan days" to be so thoroughly in the past as to be reminisced.

Use of the word "reminiscent" in this newspaper story may have been unintentional, but it is not, in the temporal dimension of the burning cross's semiotics, innocent. The story reports on a multitude of instances of cross burning that occurred over a few weeks in the Richmond area in 1951. The fact of these multiple instances of cross burning in a short time period is evidence of the active presence of the KKK's racist ideology at the moment the *Richmond Times-Dispatch* reported on them. The newspaper article does not give any indication of physical, bodily violence accompanying the burning crosses. This in itself is reasonable impetus for the interpretation that the author of the story intended the phrase "reminiscent of the Ku Klux Klan days" to refer to the period in the late-nineteenth, early-twentieth century when lynchings and beatings performed by the KKK were commonplace, so much so that the KKK exercised widespread influence on the daily activities of a huge proportion of the country's Black population. Richmond in 1951 is patently not the site of such widespread lynchings and beatings.

Nonetheless, the presence of the multiple burning crosses reported in the article bears witness to the fact that the sentiments of the KKK are, in 1951 Richmond, very much alive and well, and their advocates are actively working, through the ritual of burning crosses, to continue to exercise a widespread influence on the city's Black population. The language of the

newspaper article undermines for its intended (presumably white) reader the significant danger of the present influence of racist ideology (and its active expression, for example in the burning of the cross) by positing the 1951 burning crosses as mere shadows only *reminiscent of the Ku Klux Klan days*, rather than as expressions of the KKK's current presence, or as warnings about the imminence of a revival of the KKK's reign of physical violence. The temporal dimension of signification at play in the reporter's interpretation of the burning crosses reflects (past), indicates (present), and perpetuates (future) the belief that in 1951 Richmond, the KKK is not a significant threat of racial violence.

This history of racial violence is simultaneously a part of the semiotic backdrop for *Virginia v. Black's* interpretations as well as an *active construct* of those interpretations. Thomas's citation of the Richmond news story illustrates that racial violence, which is very much still ongoing (in his 2002 present as well as in our 2023), is regularly *positioned as* "in the past," a rhetorical move that discursively undermines instances of violence that are immediately evident in the present. Thus, the differing temporal interpretations of the burning cross that take place in the courtroom become competing stakes claimed on the construction of a specific historical narrative of racial violence.

In this way, the *Virginia* decision and Thomas's quotation from the Richmond news story have similar implications. The Court majority decision determines that, barring explicit evidence in the fact pattern of any individual case, burning a cross does not, in the present of the early 2000s, do any harm that citizens are constitutionally protected against. This final arbitration comes after a multi-page history of the cross's use as a means of terrorization. As Justice O'Connor summarizes,

> Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan, which, following its formation in

> 1866, imposed a reign of terror throughout the South, whipping, threatening, and murdering blacks, southern whites who disagreed with the Klan, and "carpetbagger" northern whites. The Klan has often used cross burnings as a tool of intimidation and a threat of impending violence.

Acknowledging that this violence is part of the immediate interpretant of the burning cross—that is, a part of the general association that exists with the sign—O'Connor nonetheless produces an entirely different interpretant in her ultimate ruling. She concludes that "to this day, however, regardless of whether the message is a political one or is also meant to intimidate, the burning of a cross is a symbol of hate." Though this statement is a moral condemnation of the cross, in legal terms, the interpretant of the cross as a "symbol of hate" assigns it to the category of protected speech acts that cannot be prohibited by law.

Moreover, this majority decision that a prohibition on burning a cross with the intent to intimidate is unconstitutional establishes the violence of the KKK discursively in the past, while actively permitting the possibility of its continuation into the future. O'Connor and the rest of the majority grant that during the KKK's "reign of terror," which extends, in her account, from its founding in 1866 to some undefined point between 1866 and the Court hearing in 2002, the primary interpretant for the cross was the threat of immediately impending violence. However, they argue, as lynching and beating decreased (but did not disappear) in the mid-twentieth century, a new interpretant was produced. During this time, the primary interpretant shifted from "impending violence" to "symbol of hate." While a threat of impending violence can be constitutionally proscribed, a symbol of hate cannot.

As in the example of the Richmond news story, the temporal dimension of signification in the *Virginia v. Black* decision carries the discursive implication that racist ideology was once a widespread source of violence in the United States, but the influence of such racist ideology is no

longer violent enough to merit the prohibition of its physical expression through the burning cross. Certainly, like 1951 Richmond, the United States in 2002 is not the site of frequent mob lynchings or beatings. Nonetheless, the United States in 2002 is still the site of considerable racial violence, both physical and ideological (which is not to say the two are mutually exclusive). The KKK rally at which Mr. Black burned a 30-foot cross and spoke about "taking a .30/.30 and randomly shooting blacks" is simply one example.

This is the point Justice Thomas makes in his reference to a mother's terror in *Skillman*—regardless of the potential historical justification for several interpretants of the burning cross, some involving immediate violence and some only invoking an ideology of hate, the burning cross is nonetheless *producing the effect* of fear for one's life and the terror provoked by physical violence, still in 2002. By opining that the burning cross has a history that includes its regular co-occurrence with physical violence such as lynchings, but that its more recent usage in the absence of such violence means it cannot, at present, be interpreted as a threat of violence unless there is outstanding evidence to support such an interpretation in a given case, the Court majority dismisses Thomas's interpretant, and those of the victims he quotes. A discursive implication of this decision is that the landscape of racial violence in the United States in 2002 no longer lends the burning cross a significance that requires (or even permits) its legal prohibition.

In this way, the courtroom disputes about the cross's temporal significance contribute to the construction and fortification of a specific historical narrative. The history of the regular co-occurrence of the burning cross with lynchings and beatings (etc.) throughout the late-nineteenth and early-twentieth century manifests a predictable interpretant for the burning cross so that, by 1951 (and still in 2002), the sign of the burning cross alone is enough to significantly influence the lived experiences and bodily actions of many Black Americans, even in the absence of

ongoing lynchings and beatings (Bell 2004; Newton 2014). That is, after several decades of the "reign of the KKK" in the late 19th century and early 20th century, during which the burning cross was regularly used in conjunction with lynchings and other acts of horrific bodily violence, the burning cross by itself had developed the interpretant of terror and threat.

In his interpretation of the burning cross as a symbol of hate, Smolla produces a resignification of this history. He points to the recent absence of lynchings and beatings in conjunction with the burning cross as evidence that the purpose of the cross can no longer be predictably interpreted as a threat or intimidation, semiotically effacing the years of history in which the burning cross obtained a durable quality of intimidation and terror as a sign in and of itself. Souter notes this effacement when he asks Smolla, "How does your argument account for the fact that the cross has acquired a potency which I would suppose is at least as equal to that of the gun?", though Souter eventually concedes Smolla's argument and joins the Court majority.

Thus, when in 2003 the Supreme Court majority releases its decision siding with Smolla and declares the Virginia statute against cross burning unconstitutional as written, it legally protects the continued use of a sign that has obtained the significance of the terror elicited by physical violence, and it does so by pointing to the fact that physical violence no longer occurs in regular conjunction with the sign as the proof that it is no longer a sign of terror that can be proscribed. As a result, the Court positions racial violence in the past, by refusing to name as such examples of its occurrence in the present (and, predictably, in the future).

Discussion and Applications

The case I have been describing is a specific kind of interpretative situation—an

interpretation that takes place under conditions of power.[5] Decisions made within the Supreme Court have tangible effects on the material and bodily lives of U.S. residents and citizens. The interpretations made within this specific context can determine whether hundreds of people will or will not be executed (*Furman v. Georgia*), who has the right to decide if pregnancies will be carried to term (*Roe v. Wade*), or under what circumstances human beings are protected from being sold as property (*Dred Scott v. Sandford*). In the case of *Virginia v. Black,* the stakes of interpretation are whether individuals who burn crosses will face fines or prison time for doing so, and whether individuals who are the intended subjects of burned crosses will be able to call the police to prevent such harassment.

Narratives of time have variable significance in interpretive situations under conditions of power. Like Sewell's (and Reed's) use of the Bastille, Slez and Levi-Martin's examination of the U.S. Constitutional Convention, and Wagner-Pacifici's analysis of 9/11 (and her examples of standoffs), I have focused on an interaction where temporality and its interpretations are especially significant, to illustrate the theoretical import of signification's temporal dimension.

One theoretical payoff to such an analysis is that, as this example illustrates, interpretations of time can be central to the meaning produced in some interactions. Peirce's primary semiotic vocabulary does not explicitly include time-specific categories, but the addition of examining how an interpretant draws on or produces certain understandings about past, present, and future can be useful for specifying *how* a sign acts in its specific capacity as a symbol, icon, or index.

[5] Not all conditions of power are conditions of *domination.* Although I note the Supreme Court's obvious power—in terms of its ability to send and bind people to behave differently than they would otherwise as a result of its decisions—I am not, in this article, critiquing this condition of power, nor classifying it as domination.

Another payoff is that careful attention to the temporality of signification in such a case can help specify *how* the relational, discursive, and performative dimensions of power (Reed 2013) function in a given context. Reed's categorization of three dimensions of power is a valuable framework for thinking about power's various conditions, and the terminology of relational, discursive, and performative power is particularly useful for analyzing a case like the Supreme Court, where decisions obtain as a result of numerous influences, and have variably physical, discursive, and institutional consequences. In future research, greater analytic attunement to signification's temporal dimension may offer theoretical and empirical opportunities to enhance the specificity of the relationship between the dimensions of power—that is, how they interact and overlap in situ.

In the example of *Virginia v. Black,* the granularity of how the legal parties make interpretations about time in their oral arguments, the effect of those interpretations in constructing a narrative about the role of racial violence in the United States, and the structural positionality of the Supreme Court as an institution are distinct, but interlocking, dimensions of the "power situation" that is the court case. Thus, the case can be read as exhibiting a relationship between relational, discursive, and performative power with the following structure. Institutional logics produced a predictable pattern of interpretation for a specific sign. A moment of possible resignification arose in which an alternate interpretant was produced and legitimated in the lower ranks of the institution, so that a debate over the appropriate conditions for the sign's interpretation rose to the highest institutional authority. Once there, two discursive histories were interwoven: the history of the sign's interpretation within the institution, and the history of the sign's usage out in the world. The winning party utilized a narrative of time-specific interpretants to construct a history in which his opponent's evidence of present interpretants for the sign could

not be validated, because they implied predictions about the future that were impossible to confirm. The successful performance of a past of varied interpretants is then cemented more fully for future interpretations by the invalidation of present interpretants that contradict the constructed history. The felicitous exercise of performative power, and therefore the vesting of the institution with durable predictability in its relational and discursive power, was highly dependent on the sign's temporal dimension.

Greater specificity about the interactions between these dimensions of power could result from increased attention to the temporality of signification. Future research might utilize an analysis of temporal semiotics to theorize the relational, discursive, and performative dimensions of power in, for example, the way an organization responds to accusations of endemic sexual assault, how a political constituent establishes legitimacy with a specific voting demographic, the varying public perceptions of the events at the U.S. Capitol building on Jan. 6, 2021, or the way abortion became a preeminent voting issue for U.S. Evangelicals. In each case, tracing the ways a certain category of semiotic interpretation draws on representations of the past, present, and future could illuminate the relationship between the relational, discursive, and performative dimensions of power that create the empirical effect under examination. As Reed notes in his call for future research into performative power, the extent to which temporal semiotics are influential should be an empirical question in each case.

In *Virginia*, Smolla's successful performance ensures the *perpetuation* of the legal narrative of a racially violent past and a present in which racism "merely" manifests ideologically rather than physically. This does not reduce the extent to which his argument is an act of performative power. That the case rose to the level of the Supreme Court presented an opportunity for the resignification of this narrative, through the potential resignification of the

burning cross's meaning. That is, bids for the validation of alternate interpretations were produced, but were ultimately unsuccessful, and thus foreclosed. Smolla's successful performance adds a new layer of durability to the interpretant of the burning cross as a symbol distinct from the historical instances of its use for violence. The performance of the *Virginia* majority decision concretizes Smolla's interpretations into the legal precedent of the Supreme Court. As a result, Smolla's argument becomes the starting point for all future negotiations about the cross's meaning, just as Hurd and Smolla had to contend with the interpretations of *R.A.V.*

The conditions of power in this empirical case are specific to the racial state. That is, the temporal semiotics at play were related to the interwoven dimensions of power whereby the Supreme Court, as the ultimate legal authority, contributes to the narrative that we are living in a largely "colorblind" present, free from much of the racial violence that constituted the country's past, and offers legal protection to expressions of virulent racial hatred, such as the burning cross. The theoretical insights of this article are not exclusive to conditions of power that are deeply racial; however, an examination of temporal semiotics may be especially useful in a number of contexts in the racial state.

For example, Brown (2018) uses interviews with previous residents of a mining community in part to trace the effects of *Brown v. Board of Education* on the lived experiences and self-concepts of African American children. Brown is highly attentive to the ways interpretations and descriptions of Black movement embed certain understandings and historical narratives. She insists on the importance of describing the "Great Migration" as "the Great Escape" to center the racial violence that caused the movement. Brown complicates the straightforward-progress narrative of desegregation through careful attunement to the varied interpretation of signifiers produced by *Brown v. Board of Education.*

Similarly, Rothstein (2017) traces the establishment of residential segregation through a variety of specific acts by the state, decentering and largely disproving the widespread belief that residential segregation is primarily the result of citizen preference, as opposed to direct government action. Both of these books are rich accounts of how racial narratives came into existence and quickly became near-ubiquitous as a result of a series of individual laws, economic incidents, and government influences. In both cases, a close analysis of the temporal semiotics of the source material (resident interviews and legal documents, respectively) might yield further insight into the construction and maintenance of racialized phenomena and the narratives that surround them.

These texts inspire increased attention to the temporal dimension of signification and suggest the utility of temporal semiotics, such as for better theorizing the interactions of power's relational, discursive, and performative dimensions in situations whose effects rely heavily on the interpretation of, and claims made about, time. A theoretical approach incorporating these elements is useful in accounting for the variable durability of some signs in relationship to their varying potential for resignification.

II.

Policing Potential Violence

Introduction

On March 3rd, 1991, four LAPD police officers beat Rodney King until he had skull fractures, broken bones, missing teeth, split skin requiring stitches, and permanent brain damage. For the entire interaction, which was filmed by a local resident, King is lying on the street, occasionally raising his arm to shield his face from the blows. The four officers were charged with excessive use of force, but were found not guilty in April 1992, resulting in uprisings in Los Angeles and across the country. After the verdict was released, an anonymous member of the jury was quoted as saying "the cops were simply doing what they'd been instructed to do. They were afraid he was going to run or even attack them" (Mydans 1992).

The literature on police conduct, training, and experiences suggests that it is true that police officers are regularly afraid that their targets are going to run or even attack them (Seron et al 2004), and that this fear is disproportionately present when their targets are Black men (Eberhardt et al 2004, Nix et al 2017, Mekwai and Bresin 2015). It is also true that the cops who beat King were doing what they'd been instructed to do, or at least what was within the bounds of what they were permitted to do, by Supreme Court interpretations of the 4th amendment at the time ("Retreat" 2009, Harmon 2012, Sekhon 2017). These are two separate, but interlocking, factors that led to King's beating, and the not-guilty verdict that his assailants later received: the officers viewed King as a physical threat, and the laws governing the limits of their conduct allowed them to use force, including deadly force, to detain a suspect they felt was a physical threat. In this paper I take the juror's two-fold comment as a jumping-off point for positing the

concept of “potential violence” as a central interpretative frame for evaluating police use-of-force.

As a legal frame, potential violence is the result of a transformation in the legal discourse, delineating the boundaries between legitimate police force and illegitimate brutality, which occurred in the Supreme Court over the past 40 years. As a cultural frame, potential violence highlights the implicit racial bias that marks Black masculinity with the signifiers of violence, threat, and criminality. Analyzing these narratives of potential violence together highlights one dimension of the disproportionate use of police violence against Black men and boys. In his now canonical essay, “Nomos and Narrative,” Robert Cover writes that “a legal tradition is [...] part and parcel of a complex normative world. The tradition includes not only a corpus juris, but also a language and a mythos-- narratives in which the corpus juris is located by those whose wills act upon it” (Cover 1995). I am positing narratives of potential violence as an important part of the language and mythos of police brutality against Black men.

I have opened with the story of Rodney King’s beating in part because it is one of the most widely theorized police attacks of its time, and because many of its details exemplify the concept of potential violence in use. However, there have been many more cases of police brutality against unarmed Black men in the three decades since King’s abuse, and, thanks in part to the growing prevalence of smartphones, an increasing number of these incidents have been filmed and distributed widely. This rapid expansion of video technology has allowed for a new dimension of analysis of the “racial field of vision” within which all Americans exist, and through which we identify and interpret acts of violence (Butler 1993). For this reason, King’s altercation with the police, the first of its kind to be recorded and transmitted widely, so that it could be watched on repeat, slowed down, examined in freeze-frame, is a fitting starting point

for analyzing some of the layers of interpretation--legal and cultural--that construct and define civilians' potential violence.

I am going to approach the concept of potential violence from two vantage points. In the first, I examine how a narrative of potential violence developed as the primary legal frame for evaluating police use of force. In the same 40 years that video technology transformed public discussion of police brutality, the Supreme Court made a series of landmark decisions that altered the legal standard for police use of force, established a new constitutional interpretation governing that standard, and triggered a chain of changes in the way that police officers are trained to evaluate, interpret, and retrospectively describe the circumstances in which they deploy force. In the second, I examine the racial underpinnings of potential violence, by highlighting cultural analyses of Black masculinity as a perpetual threat. Beginning with Judith Butler and Robert Gooding-Williams' interpretations of King's attack, I examine how evaluations of potential violence exist within the racial field of vision that marks some bodies as greater risks than others.

Juxtaposing the court's standard of potential violence with cultural narratives of Blackness helps illuminate one of the mechanisms by which the racial field is constructed and propelled into the future. The court cases I engage develop a legal standard in which an officer's right to use deadly force is dependent on that officer's assessment that a civilian poses a threat of violence to the officer or to the public. The legal discussions that take place in these cases effectively presume that an officer's subjective assessments of the risk of potential violence are rooted in the objective facts of the situation available to him at the time, and are not affected by his implicit biases about the race of the suspect.[6] The effect of this presumption is a legal

[6] Throughout this paper I use exclusively masculine pronouns to refer to officers. This is primarily because all of the officers in the specific cases I mention are men, and secondarily because studies have shown that male officers

discourse that simultaneously reifies and perpetuates racialized schemas of the uneven distribution of perceptions of violent risk, while professing objective colorblindness.

This process of reifying and obfuscating the racial field of vision is facilitated by a series of legal interpretations that center the perceptions of a police officer in the moment of a heated interaction as the basis for that officer's prediction about the possibility of a violent future-- a transformation in the legal discourse that decenters emphasis on the objective facts or historical statistics that might reveal a more accurate prediction of the suspect's likely behavior (Carbado 2002). Constitutional legal analyses of the court cases I will discuss have acknowledged that the cases establish a new reasonableness standard for police violence, rooted in an officer's perception of a suspect's potential for violence. Simultaneously, legal and cultural scholars of race have shown that Black masculinity has been vested with signifiers of violence that mark Black men and boys as more threatening than their white counterparts. I argue that the combination of these two insights from two distinct disciplines, when applied to the mechanics of interpretation in court, illuminate one link in the complex chain that produces two well-known phenomena: (1) the disproportionate use of police violence against Black men and boys, and (2) the frequent failure of the court system to convict the officers who perform this violence.

These court cases shift the legal justification for the use of force to an officer's perception of threat, failing to acknowledge the decades of cultural and psychological research indicating that Black males are widely perceived as threatening in American society. Thus, a cyclical pattern of racial violence is perpetuated: after these three court cases, police officers may only use deadly force against suspects they believe pose the potential for violence. Officers exist

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face accusations of excessive force or brutality at a 23:1 ratio of female officers (Lonsway and Wood 2002). Police violence is not exclusive to men-- as perpetrators nor as victims -- but though this paper does not analyze questions of gender, it is, ultimately, focused only on the masculine manifestations of police violence.

within a racial field of vision that makes them more likely to perceive Black males as potentially violent. The court does not acknowledge this racial bias, but establishes the expectation that officers are able to make "objective," colorblind assessments of potential threat. Such a standard validates the officer's "subjective" assessments as "objective" (the constitution of these terms in quotation marks being part of what is produced by the process of legal interpretation), *without* consideration for their racial bias, and thus legitimates and perpetuates the disproportionate use of police violence against Black men and boys.

The Changing Legal Standard for Police Use of Force

A chain of three Supreme Court cases transformed the legal standards by which police use-of-force is judged, and resignified the criteria used to determine whether an act of violence performed by an officer is legitimate or illegitimate, producing a new era of police litigation (Obasogie and Newman 2019, Carbado 2002, Alpert and Smith 1994). This transformation began with *Tennessee v. Garner* in 1984, which limited the circumstances under which an officer may use deadly force to prevent the escape of a fleeing suspect to only those situations in which the officer believes the suspect poses a significant threat of violence. The case established a dramatically new interpretation of the Fourth Amendment, overturning previous interpretations that allowed for the use of deadly force to prevent the escape of any suspected felon, regardless of whether they were believed to be potentially violent.[7]

In 1989, *Graham v. Connor* extended the *Garner* decision, establishing that all claims of excessive force must be evaluated solely under the Fourth Amendment and its reasonableness clause. Before *Graham,* use-of-force cases were often tried on the basis of the substantive due process standard of the Fourteenth Amendment (Tennanbaum 1994, Davies 2010, Alonso 2018).

[7] In her dissent in *Tennessee v. Garner* (1985), Justice O'Connor writes that "the Court's opinion sweeps broadly to adopt an entirely new standard for the constitutionality of the use of deadly force to apprehend fleeing felons."

The decision in *Graham* determined that officer intent, which was relevant under the 14th amendment, could not be taken into consideration in future use-of-force cases. After *Graham,* the only relevant criteria for whether an officer's force, including deadly force, is legitimate, is whether it abides by the 4th amendment's reasonableness clause, which *Garner* determined limits the use of force to that performed on suspects an officer believes poses a threat of physical violence. Taken together, these two cases mark a significant transformation in the legal interpretation of police use of force.

Identifying *Garner* and *Graham* as a turning point in the legal discourse surrounding police brutality is not controversial-- these two cases are widely acknowledged as being as transformative for police violence as *Roe v. Wade* was for access to abortion when it provided a new interpretation of the Due Process clause, and identified this clause of the 14th amendment as the relevant criteria for determining the constitutionality of access to abortion in the first two trimesters of a pregnancy (Fagan and Campbell 2020, Tennanbaum 1994, Lee 2012, Colb 1998). In addition to these two landmark cases, I engage the 2007 case of *Scott v Harris*. Building upon *Garner* and *Graham* and the reasonableness standard for police violence prescribed therein, the discussion in *Scott v Harris* centers the interpretive processes an officer uses to determine if a suspect poses a physical threat, and showcases the interpretative processes the Justices use to legitimate or illegitimate the officer's evaluations. As in the trial of Rodney King's assailants, *Scott v Harris* involves debate about whether the threat of potential violence is evinced or refuted by video evidence of the interaction. Thus, the case is exemplary for analyzing the interpretive frame of potential violence at work within the racial field of vision.

I am not offering a legal analysis, nor making a claim about the validity of the Constitutional interpretations in these cases. Nor am I making an argument about the procedural

details of police misconduct cases-- most police misconduct does not rise to litigation, and the vast majority of cases that enter the court system do not come before the Supreme Court. Instead, I am turning to the oral arguments and written decisions of these three SCOTUS cases as sites for analyzing narratives of potential violence as a framework for evaluating police use of force. Though statements made in oral arguments do not directly result in new precedent, the nature of oral arguments as sites of interpretive claims-making makes them rich with insight into the discursive landscape out of which new legal judgements are born. In particular, these cases demonstrate a temporal shift in the burden of evidence for which an officer's "reason" must account. Before *Garner,* an officer need only evaluate actions taking place in the present to determine whether or not to shoot a suspect: recognizing that the suspect was fleeing beyond the officer's ability to apprehend was reason enough to shoot. However, discussion that takes place in these three cases shifts the expectations of an officer's reasonableness from his ability to assess a situation in the present, to his ability to make a prediction about what might happen in the future.

In these cases, discussion of race is almost entirely absent, except that the fact patterns note that the victim in each is a Black male. In the sections that follow, I explicate the language used in the cases themselves; as a result, these sections mirror the lack of racial analysis in the court discussions. This is an important dimension of the argument I am forwarding: the legal discourse that defines police violence and citizens' potential violence is entirely colorblind. As Devon Carbado (2002) describes, the Supreme Court's interpretation of the Fourth Amendment does not ignore race-- rather, its investment in the construction of a colorblind narrative is itself a racial lens that constructs the racial field of vision just as it obfuscates the effects of that racial field on its own analysis. To understand one mechanisms of this process-- the construction of an

equal exchange between an officer's actual violence and that officer's perception of a citizen's potential violence-- I examine the discourse the court uses, before turning to how this discourse is racially coded. By juxtaposing the legal standard for an "objective" assessment of potential violence with the racial field of vision in which Black masculinity is always marked as potentially violent, I argue that the intersection of the legal and cultural frameworks of "potential violence" is an important and undertheorized location for the perpetuation of the disproportionate police violence against Black males.

Tennessee v. Garner

In October of 1974, Memphis Police Officer Elton Hymon fatally shot Edward Garner, a 5'4", 100 pound, 15-year-old Black boy, in the back of the head, as Garner was climbing a fence to flee a home where he had broken a window and stolen a purse containing $10. When Hymon killed Garner, he was acting within a Tennessee law declaring that an officer *must* use all means available to apprehend a fleeing suspect, including the use of deadly force if all other options are impossible. Though Hymon testified repeatedly that he could see both of Garner's hands and was reasonably sure that the child was unarmed, since Garner had ignored Hymon's imperative to halt, the officer was obliged to shoot in order to prevent Garner's escape. At this time, the Memphis Police Department officers were trained to "shoot for the mast" in any circumstance where they fired their weapon, understanding that such an action had a "very high probability of resulting in death" (*Tennessee v. Garner,* Oral Argument 1985).

In 1984, the Supreme Court ruled in a 6-3 decision in favor of Garner, declaring that fatally shooting a fleeing suspect who is believed to pose no physical danger constitutes an unreasonable seizure and is, as such, unconstitutional. The line from the majority decision that has made this case iconic is the interpretation that "The Fourth Amendment prohibits the use of

deadly force unless it is necessary to prevent the escape of a fleeing felon and the officer has probable cause to believe that the suspect poses a significant threat of violence to the officer or the community" (*Tennessee v. Garner* 1985, 20-21). This statement overruled the decisions of the lower courts that Hymon was justified in using deadly force simply to prevent Edward Garner's escape, even though he did not believe Garner to be an active threat, and established the "[belief of…] a significant threat of violence" as the new precedent for the justification of deadly police violence.

In this incident, the only actualized violence that occurred was performed by Hymon and aimed at Garner. However, the majority of the oral argumentation between the counsels and Justices regards the potential violence that Garner "could have" performed, but never actually did. Early in the discussion, Mr. Klein (counsel for the state of Tennessee), engages in debate with Justice Powell over what Officer Hymon would have been reasonable to assume about the case at hand. Klein insists that though Hymon believed Garner was unarmed, there was still no reason for him to believe that Garner was not a violent threat: "the officer, when he arrived on the scene, didn't know what was going on inside [the house]. There may have been some victims laying on the floor." He continues:

> Even though it may not have been a violent act that was committed [...], the idea that an individual who will break and enter is the type of individual that has a great propensity or likelihood for violence, […] and it is by the nature of the crime, *the nature of the person that perpetuates such a crime* that it is our position that therein lies the *great potentiality for violence.* [emphasis added]. (ibid).

Here Klein's argument shifts the focus from the officer's known present, to the unknown past and the potential for a violent future. He argues that the fact that Hymon could see that Garner was unarmed and of slight build is not the most important consideration for his rightness to shoot. Instead, Klein shifts the expectation on Hymon to his ability to determine whether there might have been violent acts committed before he arrived on the scene, and his evaluation of whether "the nature of the person that perpetrates such a crime [... is] the great potentiality for violence." Thus, the officer may perform deadly violence in the present if he predicts the suspect has the potential to be violent in the future.

The question of whether or not an officer can be expected to make such predictions about potential futures is debated in this case. Mr. Klein's opposing counsel, Mr. Winter, questions the likelihood of Klein's hypothetical, saying "the officer had no reason to believe that there were any dead bodies in the house, […] because one of the major differences between our position and that position of the city and the state is that they would premise the right to kill of a police officer on what the officer does not know" (*Tennessee v. Garner,* 28-29). He continues, "the Fourth Amendment requires police actions to be governed by what the officer does know, specific objective facts indicating society's legitimate interests that require a seizure of the particular individual" (ibid, 29). In this case, "society's legitimate interests" are limited to the seizure of "serious" criminals, a point made obvious when a Justice responds to counsel's statement for jeopardizing a suspect's life rather than risking their escape by asking "would you take the same position with respect to a fleeing felon whose felony is antitrust violation?" (ibid, 24) to the laughter of the chamber.

In the majority's written decision, the Court rejects Mr. Winter's call for "specific objective facts indicating society's legitimate interests" rooted in what the officer could be expected to know, for sure, in the moment of an altercation. Justice White writes:

> Nor do we agree with petitioners and appellant that the rule we have adopted requires the police to make impossible, split-second evaluations of unknowable facts. [...] We do not deny the practical difficulties of attempting to assess the suspect's dangerousness. However, similarly difficult judgements must be made by the police in equally uncertain circumstances. (*Tennessee v. Garner,* 20)

The *Garner* ruling established a precedent for a new reading of the Fourth Amendment, in which the determination about what is reasonable is to be made by the officer, in the heat of the moment. The case established that a reasonable officer is not just a reasonable person—it is a reasonable person with limited access to the complete facts, in situations that are dangerous or have the potential to become dangerous, armed with multiple weapons capable of inflicting deadly force, and pre-authorized by the State to use them at his discretion.

Graham v. Connor

While *Garner* represents a new interpretation of the Fourth Amendment that privileges an officer's evaluation of whether a suspect might pose a danger to the public, *Graham v. Connor* expands the scope of cases to which that interpretation applies. In November of 1984, mere weeks after the ruling in *Garner,* a City of Charlotte Police Officer Connor watched Dethorne Graham, a diabetic Black man, rush in and out of a convenience store, shaking, in search of orange juice to quell an insulin reaction. Suspecting that Graham was drunk, Officer Connor followed him, handcuffed him, slammed him onto the hood of the police car, enlisted several

other officers to help “toss” him into the backseat, and, an hour later, drove him home and deposited him on his front lawn, having still not received treatment for his diabetic condition (from which he became unconscious while he was handcuffed), and now suffering great bruising, head damage, cut wrists, a broken foot, and a shoulder so injured he could not administer his own insulin for two weeks.

The unanimous opinion in *Graham v. Connor* does not differ significantly from the decision made in *Garner,* but instead expands it by declaring that all police use of force cases must be judged solely by the expectations for reasonable suspicion of a suspect’s potential threat established in the *Garner* ruling. More specifically, *Graham* rules that police excessive force cases may not be evaluated according to whether the officers acted “maliciously and sadistically for the very purpose of causing harm” (*Graham v. Connor,* Oral Argument 1989, 8). So long as an officer’s risk assessment of a suspect can be deemed reasonable, his intent is irrelevant.

The language in the oral argumentation of *Graham v. Connor* directly echoes *Tennessee v. Garner’s* themes of past and future oriented hypotheticals used to illustrate the kind of evaluative process a reasonable officer might use to determine a suspect’s potential for violence. Officer Connor’s counsel, Mr. Levy, makes much the same argument as Officer Hymon’s counsel in the previous case. Levy exemplifies this position during an extended questioning from Justice Marshall regarding precisely how Graham’s treatment could be considered reasonable:

> Marshall: What was he doing that was so violent that he had to be handcuffed?
> Levy: [...] Officer Connor saw Petitioner act in a very suspicious and unusual manner. He saw Graham hurrying from the convenience store.
> Marshall: Violent?
> Levy: It wasn’t clear. He saw him hurry into a convenience store. He was hurrying out.
> Marshall: Well, what did he do that was violent?

> Levy: Petitioner's own witness said that Petitioner was throwing his hands around [...].
> Marshall: Was that threatening anybody? Did he strike anybody?
> Levy: Well, the officers didn't have to wait until he was -- [actually violent] […]
> Marshall: Did he threaten to strike anybody?
> Levy: He was acting in an unpredictable and potentially dangerous manner.
> (*Graham v. Connor,* Oral Argument, 26-28)

Levy's responses to this line of questioning mirror the language used by Mr. Klein in *Tennessee v. Garner.* In each case, it is undisputed that neither Garner, an unarmed 15-year-old, nor Graham, a diabetic attempting to recover from insulin-related unconsciousness, posed any threat whatsoever to the officers with whom they interacted, nor to the general public.

What the discussion in *Graham* adds to *Garner* is that so long as the prediction of potential violence is reasonable, an officer's language, beliefs, and intent are irrelevant to the legitimacy of the force he uses. After Mr. Beaver, Graham's counsel, describes how Officer Connor used racial epithets as he told Graham to shut up and slammed his head against the police car when Graham stated that he was a diabetic in need of treatment and reached for his diabetic identification card, one of the Justices states that "statements made by the officers during the course of the arrest that might indicate personal animus would be irrelevant" (ibid 13). Later, Beaver reiterates, "the Fourth Amendment does not prohibit malicious and sadistic seizures or seizures that are accompanied by severe injury. It prohibits unreasonable searches and seizures, and as I stated I believe firmly that the subjective intent of the officers in making a seizure is a wholly irrelevant factor" (ibid 19).

The crux of Mr. Levy's argument ultimately centers on what an officer could be expected to know in the moment that he makes the decision to use force against a suspect. After dismissing the claim that the use of racially derisive language could undermine the legitimacy of an officer's actions, Levy states:

> Police daily confront dangerous, often violent situations that require split-second judgements on the scene, in difficult, uncertain and fast-changing circumstances that pose serious risks and injury or even death to the police officers and others. It should be recognized that there is a range of actions that would be reasonable for the police to take in light of their appraisal on the scene, on the spot of the ambiguous and changing circumstances as they see them. [...] In judging the actions of the police officers it is also important that they not be -- not be looked at in hindsight in the calm of the courtroom to determine whether the officers acted in the best possible way, or whether they used no more force than we can now see was absolutely necessary in the circumstances. (*Graham v. Connor,* Oral Argument, 46)

The temporality at play in Mr. Levy's argument here echoes and expands the language used in *Garner* to permit (and indeed oblige) an officer to make decisions to shoot, in the present, based on his predictions about the potential future. Here, Mr. Levy notes that the decisions officers make cannot be the result of considered deliberation, but are split-second impulses resulting from "ambiguous and changing circumstances, *as they see them*" (ibid). The final lines of his argument complicate this temporality further: an officer decides to use force against a suspect on the basis of his prediction about a potential future in which the suspect might pose a risk of violence. The possibility that the future predicted by the officer comes to fruition is, by design, thwarted by his decision to use that force. If the case arrives in court, the court is compelled to evaluate his decision on the basis of the potential future that he predicted in the moment of his decision, without regard for information that indicates the officer's predicted future was extremely improbable even in the moment he elected to use force. The future predicted by the officer cannot be falsified, because its possibility was eradicated by the officer's use of force.

Scott v. Harris

This discussion of what an officer can be expected to know or allowed not to know at the moment he uses force is continued at length in *Scott v. Harris.* The facts of the case are that in 2001, Victor Harris, a Black 19-year-old, was driving 73mph in a relatively deserted 55 zone

when a police officer clocked his speed and began to pursue him. When he saw the police behind him, Harris sped up to flee at speeds up to 95 mph, leading the police in a 6-minute-long chase. Responding to the original officer's radio request for backup, an Officer Scott joined the chase, with no information about why Harris was being pursued, and ended the chase by crashing his police vehicle into Harris' car at a speed of 90mph, causing Harris' vehicle to spin uncontrollably, flip several times, and land upside-down, rendering Harris permanently quadriplegic.

Scott's legal defense posits that as a result of *Tennessee v. Garner,* he was permitted to use deadly force to apprehend a fleeing suspect whom he considered to pose a risk of violence to the public, and that on the basis of *Graham v. Connor,* his evaluation of the risk for violence must be understood solely from his perspective of the situation with the limited information he had at the moment he deployed force. Two primary themes consume the majority of the oral argumentation: whether Scott's assumption that Harris was a fleeing *felon* rather than a fleeing *speeding ticket recipient* was reasonable, and whether the dashcam footage of the chase confirms that regardless of Harris' status as a non-felon, his driving during the chase validates Scott's assessment that he posed a great potential for violence to the public.

One of the hypotheticals posed in the oral argument is whether Scott ought to have discontinued his chase of Harris, knowing that the license plate had already been recorded, and it would be easy to apprehend him at a later time in order to forward legal action (in fact, Harris was never charged with anything, but simply received a speeding ticket delivered to him in his hospital room after he was rendered paralyzed). Discontinuing the chase is posed as a particularly attractive alternative action because of the suggestions that once he was no longer

being pursued, Harris might return to safe speeds and the potential threat to the public caused by his driving would be negated.

But, Officer Scott and several of the Justices push back on this suggestion by insisting that it was not reasonable for Scott to cease his pursuit, in part because he didn't know *why* Harris was being pursued-- for all he knew, Harris could be under arrest for car theft, or armed robbery, or murder, making his capture a time-sensitive matter of public safety, beyond the question of the danger posed by the car chase itself. Further, Scott and several Justices argue that there was no reason to believe that Harris would stop his erratic driving if he were no longer being pursued. As a result, throughout the discussion, various Justices insist that Scott was reasonable in assuming that a) Harris had committed a violent crime or other felony, and b) that if the police ceased their pursuit, Harris would continue his "wild" speeding, "weaving," and running red lights (*Scott v. Harris,* Oral Argument 2007, 44).

By its decision, the Court declares that these were both reasonable assumptions, but the fact of the matter is that as Mr. Jones (Harris' counsel) shows, statistical evidence reveals that neither of these assumptions would be *rational predictions based on past evidence.* Mr. Jones references an expert testimony from earlier in the case that stated that in a study of police car chases over a number of years, 70% of the time a pursued driver ceases their unsafe driving and returns to "normal" driving behavior almost immediately after the police give up the chase. Justice Scalia responds:

> Did this study show what future fleeing speeders would do? I mean, I will accept that for, for the sake of argument that-- in fact, it's probably true. I would have guessed that if the police stopped chasing, you don't go 90 miles an hour anymore. But did this study show what the effect of a rule that says

stop chasing when he hits 85, what the effect of that rule would be on fleeing speeders, or fleeing felons, or fleeing anybody? (*Scott v. Harris,* Oral Argument: 53)

This comment brings up the second instance in which 'statistically probable on the basis of all past evidence' is refuted as grounds for a reasonable prediction about the future. Because Scott did not know that Harris was being pursued for a mere traffic violation, his counsel and some of the Justices argue that it was reasonable for him to assume that because Harris was so intent on fleeing, he must have committed a violent felony. However, Scott's own counsel admits that, statistically, the majority of drivers that flee in such a fashion only have an alcohol or drug infraction, which, under *Garner,* would not justify the use of deadly force.

These exchanges mark a clear separation between the legal expectation of reasonable assumptions and the actual facts regarding rational predictions. Given the evidence that most people who lead police chases have small alcohol or drug infractions rather than violent felonies, and that the vast majority of those people cease their dangerous driving and return to safe driving practices as soon as they are no longer being pursued, the only rational prediction about Harris' behavior, in the absence of any other guiding information, would be that he has not committed a violent felony, and that he will not continue to drive in a dangerous manner if the police stop chasing him. Despite acknowledging that these statistics are true facts, the court, with the exception of Justice Stevens, nonetheless declares that Scott was reasonable to assume that Harris would behave in a way precisely the opposite of what historical statistics would predict.

Ultimately, the court decides that regardless of whether Scott was reasonable in assuming that Harris was a violent felon, the question still remains whether the risk caused by the chase itself was evidence enough for Harris' potential danger to the public. The primary evidence

offered for this claim is the footage of the chase captured by the police vehicles' dashcams. As Caren Myers Morrison notes in "Body Camera Obscura" (2016), video evidence has often been expected to lend a character of obvious objectivity to a case, by removing doubt about the facts of what took place. In the case of *Scott v. Harris* the video evidence is held up as precisely such a clear and objective truth.

In this instance, the video is expected to "speak for itself." In the first-ever noted "multimedia cyber opinion" delivered by the Supreme Court, in place of an extended analysis or argument to counter Justice Stevens' dissenting opinion, Justice Scalia simply provides the URL for the video recording of the chase, and writes "We are happy to allow the videotape to speak for itself" (*Scott v. Harris* 2007, 378).

The problem with this video evidence is that there is a serious disagreement about what the recording is evidence *of*. Several Justices interpret the video as depicting exceptional violence:

> Alito: "Mr. Jones, I looked at the videotape on this. It seemed to me that [Harris] created a tremendous risk to drivers on that road."
>
> Scalia: "He created the scariest chase I ever saw since *The French Connection.* *much laughter in court room*. (*Scott v. Harris,* Oral Argument, 31)
>
> [later]
>
> Ginsburg: Anyone who has watched that tape has got to come to that conclusion, looking at the road and the way that this car was swerving, and the cars coming in the opposite direction. This was a situation fraught with danger. (ibid, 40)

Despite the claim of several of the Justices that no reasonable person could fail to find the video evidence of violently dangerous driving, Justice Stevens has an entirely different interpretation.

He writes:

> rather than supporting the conclusion that what we see on the video 'resembles a Hollywood-style car chase of the most frightening sort,' the tape actually confirms, rather than contradicts, the lower courts' appraisal of the factual questions at issue. More important, it surely does not provide a principled basis for depriving the respondent of his right to have a jury evaluate the question whether the police officer's decision to use deadly force to bring the case to an end was reasonable. (*Scott v. Harris* 2007, 390)

As explanation for this position, Justice Stevens describes his interpretation of the video. What he sees is a man stopping at traffic lights, finding other cars already stopped at those intersections by police barricades, and only then proceeding through the red lights. Stevens sees what the other Justices describe as "wildly swerving between lanes" as no more dangerous than the way anyone might pass a slower vehicle on a two-lane highway, by briefly entering the opposite lane. He notes that Harris used his turn signal consistently and only entered the opposite lane to give more space to the cars that were pulled over on the shoulder in reaction to the lights and sirens of the police cars. Ultimately, Stevens' interpretation is entirely dismissed by the rest of the court, who unanimously share Scalia's insistence that the video can be allowed to "speak for itself."

These themes from *Scott v. Harris* affirm the decisions in *Garner* and *Graham* and add the claim that there are objective truths to be gleaned from video evidence, and that differing interpretations of that video evidence can be dismissed solely with reference back to the disputed video itself, as opposed to with careful legal reasoning or interpretive explanation.

The Racial Field of Vision

In her analysis of Rodney King's beating and the trial that followed it, Judith Butler

describes a racialized and indeed racist "field of vision" within which all police action, video evidence, and court decisions take place. She writes:

> To the extent that there is a racist organization and disposition of the visible, it will work to circumscribe what qualifies as visual evidence, such that it is in some cases impossible to establish the 'truth' of racial brutality through recourse to visual evidence. [...] Consider that it *was* possible to draw a line of inference from the Black male body motionless and beaten on the street to the conclusion that this very body was in 'total control,' rife with 'dangerous intention.' The visual field is not neutral to the question of race; it is itself a racial formation, an episteme, hegemonic and forceful. (Butler 1993, 17)

Though the boy killed and the men injured in *Garner, Graham,* and *Scott* were all Black, race is not explicitly discussed in the court cases. The language of potential violence, an officer's ability to make split-second decisions, and what videos evince are all deployed throughout the oral arguments and in the written decisions without mention of race, and are thus assumed to be colorblind. In "Reel Time/Real Justice," Kimberlé Crenshaw and Gary Peller urge us to "examine critically how ideological narratives work as a form of social power, to show how a belief in formal legal equality, in the objectivity of 'the rule of law,' can help obscure the everyday character of racial power" (Crenshaw and Peller 1993, 62). Reading these cases through the lens of the racial field of vision highlights that perceptions of potential violence are deeply raced, and the Supreme Court's determination that reasonable officers make colorblind and objective assessments of potential violence operates to effectively and repeatedly obscure this racial bias, while simultaneously validating the police perceptions (and subsequent uses of force) that stem from it.

In his analysis of Rodney King's beating and the trial of his assailants, Robert Gooding-Williams draws on Fanon's oft-quoted "Look, a Negro!" passage (Fanon, 2008, 91) to argue that "the defense attorneys in the King trial successfully mobilized a battery of commonplace prejudices--in the sense of prejudgements--by convincing the jurors to read the King tape as

confirming those prejudices" (Gooding-Williams 1993, 166). He highlights the way that the officers and their lawyers alike describe King in animalistic language including comparisons to a wounded bear and to an angry gorilla. Every characterization of King's Black body is coded as potentially violent, always on the cusp of a sudden attack, even as he lies curled on the street in his own blood. Similarly, Patricia Williams notes that the language used in the courtroom took the idea of violence as the nature of Blackness so far as to turn King's body into the metaphor of a gun: "King's body helplessly flopping and twitching in response to a rain of blows became in the freeze-frame version a 'cocked' leg, an arm in 'trigger position,' a bullet of a body always aimed, poised, and about to fire itself into deadly action" (1993, 52).

Gooding-Williams' overarching argument is that nothing about King's attack and its subsequent portrayal ought to be surprising, given that it extends from a long history of portrayals of Black masculinity as perpetually primed for uncontrollable violence. Likewise, in *When Police Kill,* Franklin Zimring (2017) insists that we take seriously the discourses present in individual cases of police violence as part of broader institutional patterns (an argument shared by Charles Epp et al). The history Gooding-Williams references has certainly continued in the decades since: in a 2012 extended survey by the Associated Press, 66% of white respondents said that "violent" was a "good description of most Blacks," as quoted by Paul Butler in the "Constructing the Thug" chapter of *Chokehold: Policing Black Men*" (2017).

In "Implicit Racial Bias in Public Defender Triage," L. Song Richardson and Phillip Atiba Goff (2013) write that implicit biases are "ubiquitous and can influence judgements, especially when information deficits exist. Worse, these biases are likely to be particularly influential in circumstances where time is limited, individuals are cognitively taxed, and decision-making is highly discretionary." The circumstances Richardson and Goff identify as

being the most primed for reliance on implicit bias are identical to the circumstances Mr. Levy in *Graham* describes police officers experiencing every day. Just as Charles Epp et al (2014) argue that the institutional construction of the investigatory traffic stop exacerbates and mobilizes racial implicit bias, the decisions of *Garner* and *Graham,* affirmed in *Scott,* created a legal standard of police use of force that mobilizes and perpetuates perceptions of Black masculinity as a source of threat, while positing the standard as objectively colorblind.

These court cases center the arguments that police can only use deadly force against suspects they believe pose the potential for violence, that they must make those decisions about the potential for violence in high-stress circumstances where they have very limited information available to them and cannot be held responsible for information they couldn't be expected to have in the moment of the altercation, and that any videos of the encounters will "speak for themselves" to reveal objective facts about what occurred. Simultaneously, these court cases exist within the racial field of vision that imbues each of these narratives with the cultural and material histories of racism. The legal discourse of potential violence as due cause for the use of deadly police force intersects a cultural discourse that marks Black men as having the constant potential for violence embedded within their physical being. The understanding that police officers must be permitted to make oft-lethal decisions in moments where they do not have all the facts, and that what officers claim to believe in these moments can be validated even when they run counter to statistical facts, exists within the cognitive landscape where implicit biases are drawn upon the most heavily in precisely such circumstances.[8] And the belief that video evidence will reveal objective facts that can be agreed upon by all (even when the Justices themselves are not able to come to a consensus about what such a video evinces) belies the racial

[8] See Sullivan and Tuana, 2007.

field of vision that predictably tints an "objective" video with the very lens that marks Black masculinity with the unerring potential for violence.

The racial field of vision that Butler describes surrounding Rodney King's beating certainly highlights how police officers and jury members are predisposed to read Black men as perpetual threats of violence. But what Butler describes does not give adequate attention to the role of the legal system in exacerbating and perpetuating this field of vision. She states that visual evidence of police brutality and racial violence will not be sufficient to convince a court of the illegitimacy of those acts, because the court itself exists within the same racist field of vision. However, if we focus only on these cultural discourses of racial bias, we fail to sufficiently account for the role of the corpus juris, and the language and mythos that Cover reminds us always accompany that corpus juris, in *mobilizing and perpetuating* the racial field of vision.

The field that Butler describes does not perpetuate itself exclusively by the sheer weight of its own momentum. Nor do Supreme Court cases only interpret past actions: they inspire, influence, and justify *future* actions as well. The legal discourses incubating in oral arguments and concretized in written decisions play an important role in the active iteration of that racial field of vision. The cases of *Garner, Graham,* and *Scott* shift the standard for police use-of-force away from measures of an officer's intent, malice, or explicitly verbalized racism. They replace these measures with a standard of reasonableness rooted in the officer's in-situ assessment of a suspect's potential for violence, and establish the officer's assessment as an "objective" standard. In so doing, the court privileges the officer's interpretation of the situation as objective, denying and obscuring the role of implicit racial bias on his assessment of the risk at hand. Thus, a suspect's "potential for violence" comes to function in the court as an objective, colorblind

assessment of a police officer whose perspective has been positioned as the primary account of the circumstances, stripped from the recognition of this account's particular subjectivity.

Every court decision that validates a police interpretation stemming from the racist field of vision legitimates and reinforces the past of those interpretations, and predicts and preemptively legitimates future acts of violence with similar interpretations. Thus, with every court decision, the racist field of vision is iterated and reiterated, so that the violence, and its legal interpretation, continues, effectively binding that racial field of vision into the future.

After Rodney King's assailants were acquitted and LA erupted into uprisings of descent, President Bush said "The Court system has worked. What's needed now is calm respect for the law" (Mydans 1992). The law as it is written does not discriminate between black and white; it demands the same standard of potential violence and its interpretation by a reasonable officer regardless of the race of the victim. Even more subtly, the law as it is written means that the court is not interpreting the actual events from the safety of the courtroom, but rather determining whether the *officer's* interpretations, in the heat of the moment, are reasonable, and viewing video evidence in light of these circumstances. All of this functions to obscure racial bias, while simultaneously perpetuating the racial field of vision.

These narratives, this specific discourse of violence and its interpretations within the court system, help to maintain the image of an omnipotent institution existing outside of any field of vision, racial or otherwise. As a result, even when there are moments of collective rage at the legal system, and uprisings against it, only a very small percentage of that protest is ever aimed at the system itself (Scott 1990, Balbus 1977). After the beating of Rodney King, and murder of Michael Brown, and of George Floyd, and Breonna Taylor, and so many others, there is outrage at the police, and fury at the interpretations of specific juries and judges. An equally

important target of critique is the specific legal discourse of potential violence, written by Supreme Court interpretations of the Fourth Amendment without consideration of cultural racial bias. The narratives of potential threat, colorblind cops, and objective risk assessments that develop in the SCOTUS chambers legally bind the interpretations of judges and juries. And so, "the court system has worked. What is needed now is calm respect for the law."

III.
Who Has the Right to Self-Defense?
What Kyle Rittenhouse's Trial Tells Us About the Racial State

In August 2020, Kyle Rittenhouse, a white teenager, shot and killed two men and injured a third, all white, in Kenosha, Wisconsin, at a protest against the police shooting of Jacob Blake. In November 2021, Rittenhouse was acquitted of all charges, after his defense successfully argued that his actions were in self-defense, based on the legal tradition of "Stand Your Ground" (SYG). The trial was widely publicized, and Rittenhouse's acquittal left a significant political wake. Proponents of stronger gun control condemned the verdict as an example of a right-wing judge miscarrying justice and validating increasingly rampant vigilantism. Proponents of expanded 2nd amendment rights lauded the verdict as the appropriate legitimation of what they saw as an honorable citizen's necessary retaliation against increasingly rampant lawlessness and attacks on white masculinity-- many right-wing organizations hosted rallies in Rittenhouse's honor across the country in the months following his actions in Kenosha (Yang 2021; Schott 2021). Due in part to its publicity, and in part to the fact that it represents a considerable expansion of Stand Your Ground legislation, the Rittenhouse case is ripe to be a reference point for much SYG jurisprudence going forward, both in public commentary and in future murder trials. As a result, the trial functions as a showcase of several of the key legal narratives that pervade contemporary cases involving violence in the name of self-defense, lending insight into who has the right to self-defense, and whom they have the right to defend themselves from.

Since the passage of the first of its kind in Florida in 2005, Stand Your Ground laws have proliferated in the United States: by 2021, 27 states had an explicit SYG law on the books, and nearly a dozen more have established doctrine that accomplishes similar goals through the judicial interpretation of the state's self-defense laws (Pantekoek 2020). Stand Your Ground laws establish a citizen's right to use deadly force to protect themselves if they believe they are

in immediate physical danger. Specifically, SYG laws remove the "duty to retreat"-- that is, when one believes themselves to be under attack, one is under no burden to retreat or attempt to flee, even if the opportunity to do so is readily available and would mitigate the danger posed by the potential assailant. Under SYG, deadly force (such as the fatal use of a firearm) need not be used as a last resort in order to be justified; a citizen has the right to use deadly firepower as their first line of defense against anyone they reasonably feel poses them danger.

This category of law expands a long-standing juridical phenomenon known as the "castle doctrine," which stipulates that a citizen has no duty to retreat from a potential assailant in their own home, but may use deadly force to protect that home, or the family that resides therein. All 50 states have some version of the castle doctrine, and many extend the jurisdiction of one's "castle" beyond one's residence to include an occupied vehicle, and one's place of work. When Florida introduced the first Stand Your Ground law in 2005, it marked a radical expansion of the castle doctrine, so that one's "castle" became a sort of mobile force-field, accompanying one wherever one goes, including in any public venue. (ibid; Cheng and Hoekstra, 2013).

Race and Stand Your Ground

Studies have demonstrated that the adoption of SYG laws does not deter robberies, burglaries, or muggings, but in fact increases murder and nonnegligent manslaughter an average of eight percent (Cheng and Hoekstra, 2013). Moreover, SYG laws specifically increase white on Black murders, as well as increasing the number of such murders that are described as self-defense, and thus go unconvicted (U.S. Commission, 2020; Ferraro and Ghatak, 2019; Lee, 2012). The racial disparity of SYG outcomes has prompted much scholarship, some arguing that the laws' application in court often permits racial bias as the reasonable justification for fear (Perez, 2021; Cacho, 2014; Chiricos, Hogan, and Gertz, 1997; Mears and Stewart, 2010), and

that SYG legislation functionably permits the use of deadly force as a legitimate response to racial prejudice (Torres et al, 2017; McCann, 2014).

The juxtaposition of two widely publicized cases in particular triggered significant outrage against, and research into, the inconsistencies in the success of SYG defenses in court. Infamously, in 2013 half-white, half-Latino George Zimmerman was acquitted of all charges on the basis of SYG after he shot and killed unarmed, Black 17-year-old Trayvon Martin as Trayvon was walking back to his father's house after purchasing snacks at a convenience store. Though Zimmerman actively pursued Martin, who was attempting to flee from this pursuit, the jury determined that Zimmerman was reasonable to be afraid of Martin, and that this perceived threat justified the use of deadly force in self-defense. Only months after Trayvon's death, a Black woman, Marissa Alexander, was sentenced to a mandatory minimum of 20 years in prison for aggravated assault after pleading Stand Your Ground when she fired a warning shot in the direction of her estranged husband (without hitting him) after he sent her texts in which he threatened to kill her, and began making advances at her. Alexander's husband had a history of physically abusing her, to which he himself testified in court, and Alexander had attempted to flee the house via the garage, and fired the handgun only when the garage door malfunctioned and failed to open, cutting off her only escape route. Regardless, her appeal to SYG was unsuccessful in court, on the basis that her fear was unfounded and thus unreasonable, and she served several years in prison before being released on a plea deal (Martin, 2013). Both George Zimmerman's acquittal and Marissa Alexander's conviction occurred in the state of Florida, and were thus beholden to the same SYG laws, despite the dramatic difference in the outcomes of their cases.

Most SYG laws dictate that deadly force may be employed in situations in which there is "a *reasonable* assumption of imminent deadly threat to one's life" (Ferraro and Ghatak, 2019)

[emphasis added]. There is a wealth of legal scholarship tracing the history and implications of the "reasonable person standard" in many areas of the law, from sexual assault (Shoenfelt et al, 2002; Adler and Peirce, 1993), and tort law (Miller and Perry, 2012), to the suggestion that there ought to be a distinct "reasonable Black person standard" (Carpiniello, 2000). Because the 4th amendment protects citizens from *unreasonable* searches and seizures, many prominent Supreme Court cases[9] involving police use of (sometimes deadly) force revolve around the question of whether an officer's fear in situ was reasonable given the information that officer had at the time (Harmon, 2012; Sekhon, 2017). Much research has demonstrated that officers are more inclined to feel threatened by Black males than by any other demographic (Eberhardt et al 2004; Nix et al 2017; Mekawi and Bresin, 2015). These implicit biases surface in the courtroom through carefully coded language that is colorblind on its surface, but is deeply imbued with the cultural discourses of violence, animalism, and otherness that mark Black masculinity as a perpetual source of threat, and result in the disproportionate use of force by police officers against Black males.

Similar discursive logics pervade Stand Your Ground court cases. Americans of all races are more likely to view Black males as more violent, threatening, and animalistic than males of other races, as well as to routinely perceive Black boys as many years older than their real ages (Goff et al, 2008; Richardson and Goff, 2013). Random objects in the hands of Black males are routinely mistaken for guns (Payne, 2006). Such widely ingrained patterns of racial bias in the perception of threat produced and maintain the "folk devil" of Black males, particularly Black teenage males, as threatening criminals (Collins, 2002; Stabile, 2006; McCann, 2014; Torres et al, 2017; Eberhardt et al, 2004). News coverage of Trayvon Martin's death, and Zimmerman's

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[9] See *Tennessee v. Garner (1984), Graham v. Connor (1989), and Scott v. Harris (2007)* in particular.

murder trial highlight such narratives in action. Despite the fact that he was unarmed, and did not pursue Zimmerman in any way, in court Martin was represented as a "thug," threatening Zimmerman by the mere presence of his "body out of place" in the predominantly white neighborhood in which his father lived (Puwar, 2004; Combs, 2016; Lee, 2012).

Much of today's racism manifests through "code words" that are broadly understood as having racialized meanings, without actually naming race or using explicit racial slurs (Omi and Winant, 2014; Bonilla-Silva, 2003). Laws and legal interpretations that invoke a standard of "reasonable fear," such as 4th amendment interpretations and SYG laws, enhance the efficacy of such "colorblind" code words, because such cases hinge on perceptions of threat, fear, risk, and potential violence, without taking into consideration the extent to which such perceptions are reliably racialized. The legal precedent for establishing the reasonableness of an individual's fear as justification for the reasonableness of their use of force in self-defense exacerbates the disproportionate use of violence against Black males, and shrouds the fact that the "reasonable" (which is to say "statistically average") American perceives Black males as inherently threatening (Fagan and Campbell, 2020; Lee, 2012; Carbado, 2002; Butler, 2019; Eberhardt et al, 2004).

Because SYG argument are most likely to result in acquittals when employed by white shooters with Black victims (Martin 2013), Kyle Rittenhouse's acquittal for the deaths of Joseph Rosenbaum and Anthony Huber, and the injury of Gage Grosskreutz, all white, is the exception rather than the norm. However, such an exceptional case can reveal important insights about broader social phenomena (Burawoy, 1998). Though Rittenhouse's victims are all white, his legal defense successfully utilizes many of the same legal narratives that function as racialized "code words" in SYG cases involving Black victims. As a result, the case evinces the underlying discursive logics that pervade SYG cases. Moreover, Rittenhouse's acquittal despite the

whiteness of his victims serves to insulate the court from the accusation of racism in the disparity of SYG case outcomes. That is, one could argue that because Rittenhouse's SYG defense was successful against his white victims, the SYG legal standard cannot be accused of being predisposed to success in cases of white-on-Black violence.

In order to unpack this claim, I perform a close textual analysis of the entire court proceedings throughout Rittenhouse's trial. Courtroom arguments and their variable success in judge and jury outcomes establish discourses that persist in time and manifest in future cases through the tradition of legal precedence. This process can function to concretize cultural phenomena such as racial stereotypes into state legitimation, through the admittance, and validation, of particular claims in court. Because the Rittenhouse trial involves only white victims, it offers a relatively unique look at the discursive logics that pervade SYG defenses. As a result, the case offers novel insights into the "colorblind" narratives that result in the racial disparity of SYG cases in the United States.

This article presents a semiotic analysis of the arguments constructed in the courtroom during Kyle Rittenhouse's murder trial in 2021. I offer a dramaturgical interpretation of the trial, arguing that the prosecution and defense worked to cast Rittenhouse and his victims as recognizable characters in a familiar play, in order to guide the jury towards a verdict that would seem, as a result of the familiar narrative, inevitable. I conclude by suggesting that the drama of Rittenhouse's trial and acquittal relies on, and ultimately reinforces, the same legal narratives that enable "colorblind" discourses to result in the disproportionate success of the Stand Your Ground defense of white male violence against Black males.

I highlight three primary argumentative frameworks that resulted in Rittenhouse's acquittal. 1) There are categories of citizen that, as a result of their characteristics or personal histories, are inherently threatening, in opposition to the category of citizen that is unmarked by

"threat" and as a result maintains continuous access to the right to be afraid. 2) If the state is the body with the monopoly on the legitimate use of violence, there is a category of citizens for whom proximity to the arms of the state that deploy such violence (police, military, etc.) results in their unofficial authorization as *para-agents of the state,* allowing for the legitimation of their own uses of violence as "on behalf of" pre-established state agencies. 3) The category of "threatening weapon" is not fixed but is rather dependent on the wielder of the object in question. Firearms wielded by authorized agents and para-agents of the state are not legally recognized as threatening weapons, but any number of everyday objects become classified as threatening weapons when in the hands of citizens whose categorical identity has marked them as a "threat."

The remainder of the paper will proceed as follows. First, I briefly recount the timeline of events in downtown Kenosha on the night of August 25th, 2020. Second, I present key moments in Kyle Rittenhouse's trial that evince how Rittenhouse and his three victims are cast as characters playing the roles dictated by the framework of a Stand Your Ground line of defense. I will specifically highlight the way in which Rittenhouse and his AR-15 are presented as authorized extensions of law enforcement, reasonably experiencing fear, and how Rosenbaum, Huber, and Grosskruetz, and the various domestic objects they carry, are presented as deadly threats not only to Rittenhouse, but to law and public order. Finally, I highlight how these narratives reference and reinforce racialized discourses of threat, risk, and fear that perpetuate the variably protected right to self-defense.

The Events

On August 25th, Kyle Rittenhouse, a 17-year-old white student from Antioch, IL traveled half an hour to Kenosha, WI in response to the Black Lives Matter protests against Jacob Blake's

abuse by police officers that were occurring there over the course of several days. Several months prior, Rittenhouse had accompanied his older friend, Dominick Black, as Black purchased an AR-15 rifle with Rittenhouse's money, though in Black's name and with Black's license (Rittenhouse was below the legal age for a firearm license in Wisconsin). In the early afternoon of Aug 25th, Rittenhouse joined a crew of volunteers cleaning graffiti from a local high school, and by late afternoon he and Dominick approached a "Car Source" dealership and spoke to the owners, with whom they had no prior relationship. Illegally armed with the AR-15 Black had purchased for him, Rittenhouse offered his volunteer protection services to the Car Source owners, who instructed him about the three separate locations of the dealership on nearby corners, and then left their business in the hands of Rittenhouse and the dozen or so other armed volunteers that had amassed at the location.

As the evening progressed, demonstrations intensified-- most were peaceful performances of chants and songs mourning the injury of Jacob Blake, but some individuals in the crowd set dumpsters on fire and broke windows of cars on the street. Advancing police barricades pushed protestors in the general direction of the Car Source, and Rittenhouse moved to provide his protection services at one of the locations nearer the bulk of the crowd. As he walked in the direction of the other car lot, he asked passersby if they required medical assistance, gesturing to the First Aid kit he wore in a fanny pack, and claiming to be an EMT (he was not). As Rittenhouse walked with Black's AR-15 slung across his body, 36-year-old Joseph Rosenbaum, unarmed but carrying a plastic bag containing deodorant, underwear, and socks, began to taunt him with expletives, and lunged towards Rittenhouse, though never coming within a few meters of the teen. Rittenhouse returned a few expletives, but changed course and headed in a different direction, followed closely by Rosenbaum. After a few dozen yards, Rosenbaum again "false-stepped" toward Rittenhouse, at the same moment that a Mr. Ziminsky about a

block away fired a single shot into the air, for reasons unknown. In the second after this shot, which harmed no one and took place far down the street from Rittenhouse and Rosenbaum, Rittenhouse unloaded a quick succession of 4 shots in less than a second into Rosenbaum's torso, killing him.

Rittenhouse flees the scene in the direction of the police barricade, making a phone call to Dominick Black in which he states that he just killed someone, and then begins to jog into the crowd of protestors. As he jogs, holding the AR-15 with both hands, members of the crowd that witnessed Rosenbaum's death point at Rittenhouse and yells "He shot someone!," "He's the shooter!," and "Stop his ass!." One individual attempts to grab Rittenhouse but does not make contact. Rittenhouse trips over his own feet, and while he is on the ground, an unidentified individual kicks him and runs away-- Rittenhouse shoots at this man twice, but misses. As Rittenhouse is getting up, 26-year-old Anthony Huber hits him along his shoulder and head with a skateboard in one hand, and attempts to wrestle the rifle away from him with the other hand. Rittenhouse shoots Huber once in the chest at a range of a few inches, killing him immediately. 26-year-old Gaige Grosskreutz, who witnessed Rittenhouse kill both men, and who was holding a legal handgun, which he does not point at Rittenhouse, slowly approaches Rittenhouse as he hunches over Huber's body. Rittenhouse shoots at Grosskreutz, hitting him in the arm, before running away. As Rittenhouse runs toward the police barricade, with the rifle around his body, but with his hands up, yelling "I just shot someone," a police officer tells him several times to go home. Rittenhouse returns to Dominick Black's residence, and then turns himself in at a police station in Illinois later that evening.

On November 19th, 2021, Rittenhouse is acquitted of all charges.

The Legal Argument

The crux of the legal argument at stake in this case is captured in an exchange between the prosecution and Rittenhouse. Near the end of his questioning of Rittenhouse, the prosecution puts on the screen a still image of Rittenhouse standing over Anthony Huber's dead body, with the AR-15 pointed directly at Gaige Grosskruetz, who is hunched over, with his hands in the air-- one of Gaige's hands is holding a pistol, which is pointing straight up in the air.

> The prosecution asks: "Can you help me understand, Mr. Rittenhouse, why Gaige Grosskruetz, with a pistol in his hand is a threat to kill you, but you, with an AR-15 pointed at him is not a threat to kill him at this moment?"
> Rittenhouse responds, with emotive gestures such as holding his head in his hands and running his fingers repeatedly through his hair: "I had been attacked by several people and he decided to come and point a gun at my head."
> Prosecution: "He hasn't done that yet, has he?"
> Rittenhouse: "No."
> Prosecutor: "So again I ask you, in this moment, you told us Gaige Grosskreutz is a threat to you right now."
> Rittenhouse: "Yes"
> Prosecution: "He's got a pistol, not aimed at you. You've got an AR-15, aimed at him. Why is he more of a threat to you than you are to him?
> Rittenhouse: "Because he was moving at me with a gun in his hand."
> Prosecution: "This is right after you've killed Anthony Huber, correct?"
> Rittenhouse: "Yes."
> Prosecution: "This is right after you've fired two shots at point blank range, at the man who kicked you, missing him, correct?"
> Rittenhouse: "Yes."
> Prosecution: "And you're telling us that Gaige Grosskruetz is the real threat at this moment?"
> Rittenhouse: "Yes."

That the jury declares Kyle Rittenhouse acquitted of all charges, on the basis of his right to stand his ground, requires them to agree with Rittenhouse's representation of the encounter above: that despite his greatly superior weapon, previous deadly actions throughout the evening, and pointing the AR-15 directly at each of the men he shot, by the time he reaches Gaige, his

final victim, *Kyle* is still the character with the greatest right to be afraid for his life, and thus to defend it with deadly force.

The prosecution presents this scene to Rittenhouse, and to the jury, as a curious puzzle to be explained. Rittenhouse's defense of Stand Your Ground depends on the claim that he was afraid for his life, that he was reasonable to be afraid for his life, and that he did not instigate the circumstances resulting in his reasonable fear for his life. It seems obvious to the prosecution that the moment he describes is a moment in which Rittenhouse has not been threatened by Gaige, but is actively threatening Gaige, by pointing the AR-15 at him, after having killed two other people. How then does the entire jury come to see this same moment as a moment in which a scared teenager trying to serve his community is threatened by a lawless vandal attempting to kill him? By the time we reach this moment in the prosecution's questioning, near the end of the trial, a stage has already been set, cast with characters whose early-defined roles function as a lens through which all subsequent evidence would be interpreted.

Alexander (2010) writes that "political struggle achieves clarity and persuasive power by defining the difference between one's own side and the other's, connecting 'us' to the sacred civil qualities that sustain liberty and linking 'them' to the anticivil qualities that profane political life, undermine liberty, court repression, and the open the door to corruption" (12). While there may be court cases to which this statement does not apply as aptly as it does in the political campaign context about which Alexander wrote it, a trial such as Rittenhouse's has all the trappings of a political performance, since gun rights have become one of the most bipartisan political issues of the 21st century, with support for Black Lives Matter protests close behind. As a result, this trial became highly publicized, and thus imbued with all the performative characteristics Alexander assigns to politicians, from the embodiment of a caricature that must be believable when played by the candidate, read as authentic (and thus resistant to the profaning

accusation of being "all an act"), and absorbable into the zeitgeist of the time and place in which it is being performed, to the distinction of all characteristics into strict binaries.

The political performance that results in Rittenhouse's acquittal has three primary movements. First, Rittenhouse's victims are profaned, depicted as lawless, anticivil actors threatening not only Rittenhouse himself, but social order writ large. Second, Rittenhouse is positioned not just as a model citizen in contrast with his profaned victims, but something of a higher order altogether. The teen is strategically aligned with various categories of first responder that lend him both the authority to use the kinds of violence usually prohibited for ordinary citizens, and the heroic status granted the likes of firefighters and police officers who risk their lives to protect the general public. Finally, the trial's actors are vested with props to suit their characters: Rittenhouse's illegal AR-15 is rendered neutral and non-threatening, and the various household objects carried by his victims (including deodorant, socks, and a skateboard) are transformed into deadly weapons pregnant with the constant potential for assault.

Profaning the Victims

The representation of Rosenbaum, Huber, and Grosskreutz as unstable and violent threats to public order is established most easily in the case of Rosenbaum. Rittenhouse's defense begins his closing statement with an attack on Rosenbaum's legal status, in summation of the arguments made by the defense throughout the trial. He begins:

> Ladies and gentlemen, this case is not a game. It is my client's life. We don't play fast and loose with the facts, pretending that Mr. Rosenbaum was citizen A, number one guy. He was a bad man. He was there. He was causing trouble. He was a rioter and my client had to deal with him that night alone.

The use of the phrase "citizen A" here hints at the insinuation that Rittenhouse had access to a level of citizenship, and the rights offered thereby, over and above that held by the men he shot. Rosenbaum was not a full citizen, he was a "bad man." This status is established by numerous exhibits in court. Rosenbaum had been diagnosed with bipolar disorder. On the morning of August 25th he had been released from the hospital following a suicide attempt-- his second in two months. He had a long criminal history, including various drug infractions, aggravated assault, and sexual abuse charges as a minor. Throughout the evening of August 25th, multiple videos captured Rosenbaum setting fire to several objects including a dumpster, yelling profanity at many groups of people, and repeatedly saying "shoot me, n*****" to the armed men in Rittenhouse's cadre. These facts make Rosenbaum the least controversial of Rittenhouse's victims. His mental disorder, his criminal history, and his antagonistic behavior throughout the evening function to establish him as belonging to a lower category of citizenship, marked by instability, unpredictability, and opposition to the law.

The statements "he was there" (in downtown Kenosha on that night, a fact that obviously applies to Rittenhouse as well), and "he was a rioter" invoke an us vs. them dichotomy well-established in the media. Rittenhouse's defense's gesture toward the fact that Rosenbaum was present at the rally functions to align Rosenbaum with the Black Lives Matter movement, a "them" positioned in categorical opposition with the "us" of the police. The intention behind this rhetorical move is exacerbated by the reference to Rosenbaum as a "rioter"-- a derogatory term frequently used in the media to delegitimize the political act of marching in the streets in protest against state violence.

The second half of this sentence renders explicit the us vs. them dichotomy the defense is invoking. "My client had to deal with him that night alone" highlights an argument the defense makes several times: that Rosenbaum isolated Rittenhouse and ambushed him. Despite the fact

that Rosenbaum encountered Rittenhouse as Rittenhouse was walking down a crowded street from one Car Source lot towards another, much is made of the fact that there was a dumpster on one side of Rittenhouse, preventing his escape in that direction, and that there was a large group of protestors on the other side, which Rittenhouse insists prevented his escape in that direction. Though Rittenhouse was not by himself-- there were dozens of unarmed, peaceful protestors in his immediate vicinity, both he and his defense repeatedly insist that, in the absence of other members of his own group, he was "alone." This framing is an important repetition of the us vs. them narrative that permeates the trial-- though Rittenhouse had not previously met any of the men he was with on August 25th with the exception of Dominick Black, the other men with AR-15s are repeatedly referenced as "his group," and he is considered to be alone any time he is not with members of this group, and he repeatedly gives testimony that his motivation for going to specific locations throughout the evening was "because there were people there," when he means specifically that there were other members of his group at the location.

The second meaning of this sentence foreshadows the representation of Rittenhouse as an extension of law enforcement. "He was a rioter and my client had to deal with him that night alone" establishes Rosenbaum as a threat to public order that Kyle Rittenhouse alone was tasked with neutralizing. There is no dispute that police officers are numerous in the area in which these events took place, but their presence is of little import to the narratives constructed by both the defense and the prosecution. In this context, it appears to be taken for granted by all that the protest itself was a significant event consuming the attention of the entirety of the Kenosha police department, and as a result, the police were "on guard" against the perceived imminent risk that the peaceful core of the protest might at any moment become dangerous, so were unable to take legal action against the "rioters" such as Rosenbaum, who were starting fires and threatening citizens.

Rittenhouse heroicized as *para-agent* of the state

Kyle Rittenhouse's relationship to law enforcement is one of the most pervasive themes of the legal narrative present throughout the case. Throughout the trial, there is a recurring tension between the representation of Rittenhouse as a legitimate member of various skilled organizations designated to provide essential services to the public, even if it means putting himself in harm's way, and the image of Rittenhouse as a precocious teenager, barely graduated from his online high school certificate program, excited to start living out a specific form of masculine patriotism by playing EMT, firefighter, police officer, soldier. These dual narratives are often accomplished by the same statements and facts. For one, Rittenhouse's background confirms that throughout his high school career, he has been heavily pursuing whatever paths toward proximity to first responders were available to him. He was a lifeguard (the most advanced position available to a teenager in the "medical" field), a cadet with the Antioch Fire Department, and a member of the "police explorer" high school recruitment program at the Grayslake Police Department.

Each of these positions came with various pieces of branded merchandise identifying Rittenhouse as authorized on behalf of the institution whose name it bore. The med kit he carried on August 25th was issued by the Red Cross at his local pool. He had been given t-shirts with "Antioch Fire Department" on the front, and "Staff" on the back. About ten minutes into his questioning by his defense, Rittenhouse states that he had with him on Aug 25th a bulletproof vest, but that he gave it to his friend, because "I'm just going to be doing the medical, so I don't need the bulletproof vest. I'm just going to be helping people." His attorney asks him, rhetorically, "why does a 17-year-old kid have a bulletproof vest?" Rittenhouse responds, "It was issued to me by the Grayslake police department." Over and over, Rittenhouse's pre-professional connections to various forms of law enforcement and first responders are

highlighted, primarily (in the case of his defense) to evince his dedication to serving his community and "helping people."

However, Rittenhouse's inexperience, lack of real training, and inability to respond to an emergency also emerge repeatedly, not only from the prosecution, but from the defense, and from Rittenhouse himself, highlighting his youth as an obvious indicator that he could not possibly be held responsible for having any official authority. For example, much is made by both the defense and the prosecution of Rittenhouse's stated intention to administer medical aid at the protest. Early in Rittenhouse's questioning, his own defense quizzes him at length about the contents of the medical kit he wore in a fanny pack around his waist, and the other supplies (Band-Aids, gauze) in the tactical box he carried for some of the evening. In the video footage captured by *Daily Caller* reporter Richie McGinniss, whom Rittenhouse authorized to interview him and follow him around the protests for a time, Rittenhouse states that he is at hand to provide medical services and to reinforce the police, given that they appear overburdened by protestors. He tells McGinniss that he is a registered EMT, and we hear him announce the same to passersby, in advertisement of his medical services.

17-year-old Rittenhouse is not an EMT, nor has he received any training as such. He is, at most, a lifeguard with about a month of experience, and as such has received the 3-day Red Cross lifeguard training course that includes a CPR certification, and some basic first aid. McGinniss's footage shows only one protestor accepting Rittenhouse's offer of medical services: a young woman who tells Rittenhouse she was hit with something on her shoulder. Both Rittenhouse and the young woman giggle as he prods her shoulder a few times, and then she walks away. On the stand, Rittenhouse recounts having "examined somebody's injured shoulder," and also describes an instance not captured on camera, in which he wrapped a woman's ankle and pointed her towards the hospital only a few blocks away. He says of this

instance: “the first time I administered medical help was this lady who I think sprained her ankle, or twisted it or something-- I don’t know. I’m not an expert on x-rays; I wouldn’t know.”

Later, Rittenhouse is questioned about his involvement with the Antioch Fire Department. The exchange he has with the prosecution here demonstrates the tension in Rittenhouse’s self-perception, and his representation in court, and is thus worth quoting at length.

> Prosecutor: You weren’t a member of the Antioch Fire Department, were you?
> Rittenhouse: [emphatically] *I was*.
> P: You were an actual, on duty, member on the roster of the Antioch Fire Department?
> R: No, no.
> P: So when you say you’re a member, what do you mean?
> R: I was a member of the Antioch Fire cadet program. We were issued shirts, Antioch Fire Cadet, Member; we would help with the pancake breakfasts at the VFW and we would wear Antioch Fire Department staff shirts; I still have one in my closet.
> P: And maybe I didn’t express myself clearly. You were not a member of the Antioch Fire Department, correct?
> R: I was a member of the cadet program which was through the fire department.
> P: So you’d go out and fight fires?
> R: We can go on ride-alongs, but we can’t go into burning buildings, for liability reasons.
> P: You’d go out there and you’d save people from burning buildings?
> R: Not me personally.
> P: Cause as a cadet they’d never let you anywhere near that, correct?
> R: They’d never let any of the cadets go into an *actual, live, fire.* [italics to connote Rittenhouse’s emphasis and tone].
> P: At the end of whatever this program is, you weren’t going to be an actual, official firefighter, were you?
> R: No, it’s to help prepare you for the firefighter academy; the firefighter EMT academy.
> P: And you weren’t going to be an EMT at the end of this program either, were you?
> R: [emphatically] No.
> P: You know that to be an EMT you need to be 18 and a high school graduate, correct?

> R: Uh, in Illinois you can take a class at the college at 16 and get your EMT license at 17. I wasn't in that class, but in Illinois you can.
> P: You never did any of that?
> R: No, I was in online school.
> P: On the night of August 25th you're here in Kenosha, WI saying you're an EMT, correct?
> R: Yes.
> P: That was a lie?
> R: Yes.

In this exchange, Rittenhouse attempts to claim full membership in the Antioch Fire Department, emphasizing his qualification for such membership by pointing to the physical representations of that membership (in the two references to shirts he acquired through the department) and highlighting training drills in which he participated. At the same time, he acknowledges, somewhat indignantly, that of course his status as a minor makes him entirely unequipped to perform the actual tasks required of fire fighters and thus renders him ineligible for full membership in the department, with all the responsibility (entering burning buildings, saving people from fires) that necessarily entails.

In another instance, the prosecution asks Rittenhouse why he was in downtown Kenosha on the night of August 25th in the first place, and Rittenhouse explains that he was there to protect businesses, provide medical services, and put out fires. The prosecution asks "aren't those all things people would normally call 9-1-1 for?," to which Rittenhouse responds, "They were already busy, so I wanted to help out."

With this line of questioning, the prosecution seems to intend to portray Rittenhouse as an extralegal vigilante, a minor nonetheless, interfering in the provision of genuine emergency services by contributing to the crowd blocking the roads against police, ambulances, and firetrucks, and having no real skills to contribute to the efforts he claims to undertake. This argument is bolstered by reference to Rittenhouse's lack of professional training or certification,

his age (17), and the many recorded examples of his apparent belief that laws do not apply to him, including his own admission that he had, for months, been driving to and from work every day without a valid driver's license, that he did not (and indeed could not) have a license for the AR-15 he carried, nor was it registered in his name, and that his presence in downtown Kenosha violated both the emergency city curfew, as well as the police barricades erected to prohibit entry to Sheridan Road, where he spent most of the evening.

However, within the context of the courtroom, the prosecutor's attempt to use Rittenhouse's extra-legality to posit him in opposition to law enforcement is radically unsuccessful. In fact, the interactions I have cited instead function to associate Rittenhouse even more closely with law enforcement, legitimating his actions and further enabling the argument the prosecution posed as paradoxical: that Rittenhouse, having just killed two people, and with his AR-15 pointing directly at Gaige Grosskreutz, could not reasonably be interpreted as a threat to Grosskreutz' life. In the legal framework employed by the defense, and, ultimately, the jury, Rittenhouse's aspiration to a career as a first responder, and his dismissal of various laws are a natural pairing: Rittenhouse's association with and work on behalf of various law enforcement departments authorizes him to use his own judgment to determine which laws are necessary to ignore in emergent situations. Just as police officers regularly do not wear seat belts and drive at illegal and unsafe speeds even when they are not in immediate pursuit of a suspect, Rittenhouse can drive to Kenosha without a driver's license, and carry an unlicensed weapon because he is acting on behalf of the police, fire, and EMT agencies that he feels have authorized him by vesting him with various forms of gear and branded merchandise that identify him as one of their members.

The justification of civilians' actions on the basis of activity authorized for direct agents of the state is a common theme throughout the trial. For example, when Jason Lackowski,

another AR-15-armed member of the cadre guarding the Kenosha Car Sources, is on the stand at trial, he explains his actions on the night of August 25th in the terms of his military training with the US Marine Corps. Lackowski, a veteran, testifies that he protected the Car Source using the "shout, shove, show, shoot" method that Marines are trained to use when defending territory in combat zones: if shouting at and shoving the trespassing party prove ineffectual, you point your weapon in a display of strength, and shoot if the encroaching party still advances. This testimony goes unchallenged by the prosecutor, and is actively praised by the defense, who claims that the sequence goes above and beyond the non-lethal measures demanded by Stand Your Ground. The implication that the authorization of active duty US Marines to use such a method against enemies of war in combat zones automatically authorizes one US civilian to use the method against another US civilian on a public American street is never questioned by either counsel.

Character props: "weapon" as a floating signifier

The successful portrayal of Kyle Rittenhouse as an authorized, if honorary, agent of the state, coupled with the portrayal of Rosenbaum, Huber, and Grosskreutz as erratic, unstable, opponents of law enforcement, functions to create the unbalanced equation of fear necessary for a justified Stand Your Ground shooting. Rosenbaum, Huber, and Grosskreutz are "not citizen A"; they are "bad men." As a result, anything with which they come into contact becomes laden with malignant intent, and must be approached with reasonable suspicion. Recall that Rosenbaum was, throughout the evening, carrying a sheer plastic bag containing deodorant, underwear, and a pair of socks, given to him at the hospital from which he had just been discharged. At one point he throws this bag in Rittenhouse's general direction (it lands at least a few feet away from the boy), and Rittenhouse testifies that "he threw at me-- I know it's a bag

now-- but at the time, in the light, it looked like a big chain," using this description to explain why he first pointed the AR-15 at Rosenbaum. Similarly, when Jason Lackowski is asked if he ever saw Rosenbaum with a weapon, he responds, "other than the plastic bag, no," implying that the bag of soft personal items was, in Rosenbaum's hand, necessary to note as a weapon.

Likewise, Anthony Huber's skateboard is repeatedly referenced not only as a weapon, but as a *lethal* weapon. In the defense's opening statement, he highlights a variety of protestors that appear in a video still shot, including an unidentified woman whose flashlight he flags, saying "as you can see, under the streetlights there was no need for a flashlight other than as a weapon," but pays special attention to Huber's skateboard, describing it with the gravitas reserved for imminent matters of life and death. He states that he is sorry not to have the skateboard to show to the jury, since Huber's girlfriend has refused to relinquish it to the state, because he would have liked to highlight "the weight and heft of what the skateboard is and what that skateboard would do if someone takes it in their hand and swings down on somebody's shoulder, head, and neck, trying to sever the head from the neck, as Mr. Huber did." Earlier in the defense's own augment, he made much of a video still capturing the moment Huber's skateboard connects with Rittenhouse's head and shoulders-- noting specifically that Huber has one hand on the skateboard and one hand on Rittenhouse's gun, trying to remove it from him. That Huber did not need the strength of both hands to swing the skateboard he allegedly intended "to sever the head from the shoulders" is apparently beside the point. In Rittenhouse's testimony of the same moment, he states he shot Huber when he "held the skateboard like a baseball bat and hit me with it," not only including baseball bats in the list of lethal weapons that now contains flashlights, skateboards, and plastic bags of underwear, but also suggesting that baseball bats are generally swung by a single, non-dominant hand, as the dominant one reaches for another object.

While Rosenbaum, Huber, and Grosskreutz's representation as "bad men" taints the objects they carry with the constant potential for lethality, Rittenhouse's representation as an authorized agent of the state counteracts the possible threat of his AR-15 and renders it a neutral object. In describing the events after Rittenhouse has shot and killed Rosenbaum, and is moving towards the location where he will shoot and kill Huber and shoot at two other men, injuring one, the defense states that "he begins running down Sheridan road; he's not taking his gun; he's not threatening anyone as he's running down Sheridan Road. That's where law enforcement is, and that's where someone would run to be protected from a mob that wants to kill them." Throughout this sequence of events, Rittenhouse *is* holding the AR-15. It's strapped to his chest with a rifle sling, and he's got both hands on it at all times. He has just shot and killed one man with this gun, on a street crowded with protestors, and is now running into an area more heavily populated with people, in the direction of the police barricade. However, Rittenhouse's represented affiliation with law enforcement enables the interpretation that in this moment the AR-15 is of no threat to the crowd, and in fact that the crowd is a threat to Rittenhouse, and that he needs to reach the police as quickly as possible-- not, the in the defense's account, to turn himself in for the lethal shooting he just committed, but in order "to be protected."

A few moments later, Rittenhouse has tripped on the street and is lying on the ground, clutching the AR-15 to his chest with both hands and pointing it out at the crowd in front of him. His defense describes this moment as one in which "Kyle Rittenhouse is flat on his back, in the most vulnerable position one can be in," shifting the position of greatest vulnerability to the person holding the rifle, and away from the people at whom the rifle is pointed.

Moreover, the AR-15 strapped to Rittenhouse's chest is not only described as a neutral object posing no threat to Rosenbaum, Huber, Grosskreutz, or other members of the crowd, but is actually presented as a potential weapon to be utilized by Rosenbaum, Huber, and Grosskreutz

against Rittenhouse himself. The defense describes the encounter in which Rittenhouse shoots and kills an unarmed Rosenbaum as an encounter in which Rittenhouse is at risk of being shot with the gun he holds, saying: “Kyle shot Joseph Rosenbaum to stop a threat to his person. And I’m glad he shot him, because if Joseph Rosenbaum had got ahold of that gun, I don’t for a minute believe he wouldn’t have used it against Kyle or somebody else. He was irrational and crazy.” Similarly, he states that when Rittenhouse shot and killed Anthony Huber, “Kyle is afraid he’s going to be disarmed and shot with his own weapon.” And Rittenhouse himself testifies to this fear in all three instances, backing up the claims made by his defense about the killing of Rosenbaum and Huber, and adding that he likewise shot Gaige Grosskreutz because he believed Grosskreutz intended to take his weapon and use it against him.

Discussion

In the Rittenhouse trial, Rosenbaum, Huber, and Grosskreutz have their access to legitimated fear and self-defense stripped from them via their representation as “bad men.” The rhetorical process of casting these men as villains of the story that unfolds throughout the trial relies on a deeply seeded narrative embedded into the legal system through formal legislation, as well as through the repeated citation of precedent that concretizes arguments made by counsels in previous cases. Casting Rosenbaum, Huber, and Grosskreutz as “bad men” draws on the legal history establishing that the protections of citizenship are not universally inalienable: there are categories of citizen for whom personal histories or characteristics render them marked as inherently threatening, in opposition to the category of citizen that is unmarked by “threat” and as a result maintains continuous access to the right to be afraid.

I have quoted a number of instances in which the defense appeals to characteristics of these victims in order to establish their categorization as “bad men”-- primary among these categorizations are mental instability as evinced by histories of psychological diagnoses or

medical treatment, and histories of criminal convictions. Moreover, presence at a "Black Lives Matter" protest, as a "protestor" or as a "rioter" (Huber is identified as the former, and Rosenbaum as the latter) in comparison to presence at such a protest as "law enforcement reinforcement" (ie. carrying a rifle and helping to enforce police mandates against the occupation or destruction of property) is included as a "bad man" characteristic as well.

The effect of the "bad man" narrative is central to the primary function of Stand Your Ground laws, because the narrative effectively proscribes the ability to be reasonably afraid as the opposite of being threatening. To be a threat means that one can no longer be reasonably interpreted as afraid-- that an object of fear might itself be a fearful subject is impossible within this framework. In the Rittenhouse case, the position of Rosenbaum as a "bad man" precludes him from having access to fear that can be legitimated or validated in the courtroom. More explicitly, Grosskreutz and Huber are similarly marked as "bad men," cutting off their access to legally legitimated fear. The result of this marking is that Rittenhouse's SYG claim can only be evaluated from *his* perspective. Because the defendant's claim establishes him as the subject experiencing fear, the zero-sum application of fear means that Groskreutz and Huber's claims to fear are denied in court, despite the fact that each man approached Rittenhouse only after they watched him kill Rosenbaum, run into a crowd with his weapon still cocked after Rosenbaum fell, and pointed the cocked weapon directly at each of them. Characterizing some citizens as "bad men" desubjectifies them, preventing their fear from being legally legitimated, and thus makes it entirely impossible for them to successfully utilize a SYG argument in court, given that the premise of Stand Your Ground is the establishment of reasonable fear.

In relying on the establishment of "reasonable fear" as justification for shooting, the structure of the Stand Your Ground defense mirrors the legal precedent for legitimate police use of force, as established by US Supreme Court Cases *Tennessee v. Garner* (1985), *Graham v.*

Connor (1989), and *Scott v. Harris* (2007). These cases determine that the legitimacy of a police officer's use of force depends on the officer's "reasonable fear." Moreover, the reasonableness of this fear is established on the basis of the officer's perception of the situation and the information he had access to at the time, which does not need to be representative of the truth of the situation, so long as another "reasonable officer" might have made the same assumptions in situ (Moore, 2022).

Under the category of juridical reasoning that applies to police, an officer cannot be held liable for the extent to which his own actions in any way instigate or escalate a situation, leading to the use of force. Moreover, innumerable cases of police violence against unarmed Black men and boys have showcased the frequency with which officers' interpretation of Black males as inherently threatening is legitimated in court and utilized as defense for their acquittal. The emphasis on proximity to law enforcement that appears in the legal arguments of so many Stand Your Ground defenses serves to uphold and valorize the role (and rule) of police officers established and protected by the 4th amendment interpretations that dominate police use-of-force cases, as well as to extend that role, and the access to legitimate use of force that comes with it, to civilians that can claim some form of association or affiliation. The appeal to affiliation with or authorization by various forms of military or law enforcement in Stand Your Ground cases functions as a means to extend the legal narratives of self-defense that obtain in cases of police use-of-force.

As a result, if the state is the body with the monopoly on the legitimate use of violence, there is a category of citizens for whom proximity to the arms of the state that deploy such violence (police, military, etc.) results in their unofficial authorization as *para-agents of the state,* allowing for the legitimation of their own uses of violence as "on behalf of" pre-established state agencies. Appeals to military and police training or affiliation are cornerstones

of Stand Your Ground legal cases. In George Zimmerman's trial, for example, much is made of the fact that he had been a member of the Junior Reserve Officers' Training Corp for the Marines when he was a high schooler, that his father was an Army veteran and had been a district magistrate, and that at the time of the shooting he was the coordinator of the Twin Lakes Neighborhood Watch program, which was administered by the local police department. Though Travis and Gregory McMichael's claim to their SYG rights in their trial for the murder of Ahmaud Arbery was ultimately unsuccessful, their SYG defense case repeatedly highlighted Gregory's service as a police officer, and Travis' service in the US Coast Guard as evidence to their good character and their training to use weapons in defense of public safety.

In these cases, shooters are not recognized as full agents of the state. Rather, they come to occupy the status of para-agents, not pre-authorized with all the powers of a full police officer, for example, but with the increased likelihood that their actions *will be* authorized in court after they have performed them. This status as para-agents importantly sets the stage for the third framework responsible for Rittenhouse's acquittal.

Once the characters have been cast as bad men or para agents of the state, they are vested with props that align with the roles they have been given. In the context of a Stand Your Ground trial, the category of "threatening weapon" is not fixed but is rather dependent on the wielder of the object in question. As a result of the expansion of police use of force legislation into Stand Your Ground regulations for civilians, firearms wielded by authorized agents and para-agents of the state are not legally recognized as threatening weapons, but any number of everyday objects become classified as threatening weapons when in the hands of citizens whose categorical identity has marked them as a "threat."

In George Zimmerman's trial for the murder of Trayvon Martin, Zimmerman's defense was able to make the successful claim that Zimmerman was right to be afraid of Trayvon Martin,

since Martin had access to the sidewalk as a potential weapon, while Martin had no legitimate claim to fear of Zimmerman, despite the fact that Zimmerman had pulled out his firearm (Torres et al, 2017). Indeed, the defense brought to the trial a giant slab of concrete, to demonstrate its characteristics to the jury as a means of disputing the claim that Trayvon Martin was unarmed. Though he did not *carry* any weapon, the defense argues, Martin had access to the sidewalk on which he was walking home, which he transformed into a weapon via its potential for injuring Zimmerman if Martin were to slam his head against it. Though Zimmerman was carrying an actual, loaded gun, drawn, cocked, and pointed at Martin for a length of time before their first face-to-face interaction, Zimmerman and Martin are considered in the court to be, at most, equally armed, given Martin's access to the sidewalk as a weapon, and Zimmerman's background with law enforcement that rendered his gun always already legitimate.

Precisely the same logic functions in Rittenhouse's case: Rittenhouse's illegal AR-15 is qualified in the court as *less of a threat* than the skateboard Huber carries and eventually uses to hit Rittenhouse, and Rittenhouse is authorized to respond in fear to the sight of the skateboard, while the suggestion of Huber's fear staring down the barrel of the AR-15 is rejected. This juxtaposition draws directly from the establishment of the category of para-agent and the access the category provides to actions usually reserved for agents of the state, such as police officers. As Rittenhouse is framed as a para-agent of the state, the weapon he carries becomes an extension of this same arm of the state, a symbolic classification that not only renders it legitimate despite its patent illegality (Rittenhouse is not the legal owner of the gun; he does not have a permit to possess a gun in his state of residence nor in Wisconsin where the demonstrations are taking place; he is below the legal age for acquiring such a permit in either state), but establishes the weapon as immune from the accusation of being an escalating threat in and of itself. Associating Rittenhouse with various categories of first responders vests him with

the authority to utilize the kind of legitimate deadly force that is generally monopolized by the state, and thus grants the weapon he uses the fear-neutral status granted to police or military weapons.

These three rhetorical moves of establishing bad men, valorizing the shooter as a para agent of the state, and approaching "weapon" as a floating signifier are not unique to Rittenhouse's case. Rather, they derive their discursive power from their inherent reference to decades of precedent in which these same arguments are successful in court. In the Rittenhouse trial, these narratives function without explicit reference to race. Because Rittenhouse and his three victims are all white men, racial stereotypes are not utilized towards the project of casting the characters-- the men's whiteness is ignored as an unmarked category.

In fact, the rhetoric of race neutrality in Rittenhouse's trial functions to disentangle Stand Your Ground laws from the accusations of racial bias that have surrounded them from their onset. At many moments throughout the trial, Rittenhouse's defense emphasizes that Rittenhouse supports Black Lives Matter, and both he and Rittenhouse himself insist repeatedly that his presence at the protest was to provide essential services necessary to help facilitate such an event, rather than as any kind of counter-protest, as is often suggested about the armed men that routinely collude with the law enforcement policing and constraining such demonstrations. Though all the characters in this case are white, anti-Blackness must nonetheless be acknowledged as the backdrop for the case, coloring the fatal events that took place on the street that night, as well as the language used to reconstruct those events in the courtroom months later. The location for Rittenhouse's shooting was a protest against the abuse of Jacob Blake, a Black man who had been non-fatally shot by a white police officer in Kenosha a few days prior. The protest was heavily policed, not only by sworn police officers in full riot gear, but also by a cadre of heavily-armed vigilantes self-appointed to protect local businesses from fires and looting, to

help enforce police orders against protestors, and to administer medical assistance to people injured by the actions of protestors. This setting establishes the location of Rittenhouse's actions within a long series of protests against police shootings of African Americans, broadly referred to as "Black Lives Matter protests,"[10] situating it within established political discourses that impose an "us vs. them" narrative in which police, men with assault rifles, and Republicans are pitted against Black people, demonstrators, and Democrats. Some of the language of this particular us vs. them dichotomy is present in the courtroom at Rittenhouse's trial, and its significance as the cultural backdrop for all the conversations that occur therein cannot be downplayed or dismissed.

This context of the protest sets the stage on which Rittenhouse's acquittal is necessary for the maintenance of systemic white supremacy, especially the right of white men to move freely through all spaces and contexts, as well as for the plausible deniability that a system of white supremacy exists at all. As demonstrations under the widespread classification of "Black Lives Matter" have become a routine and predictable response to the publicized shooting of unarmed Black men, especially by police, in the past decade, two dominant narratives have become increasingly entrenched. One paints a picture of increasing lawlessness and public disruption symptomatic of a degradation of the foundation of social order: respect for the law and its enforcers. The other highlights the increasing attention and resistance to the historical reality of disproportionate (though entirely routine) police brutality against Black Americans, especially Black men and boys, as a righteous continuation of the Civil Rights movement.

[10] Though the term "Black Lives Matter" remains popular in the media to describe protests that occur in response to police violence against Black people, there is no cohesiveness that ties the events together--they are not organized by a centralized institution.

Between these narratives, Rittenhouse's acquittal functions to reattain a semblance of social order (if, certainly, a social order predicated on a racial hierarchy that involves the regular abuse of Black people by the police) and the assertion that law enforcement and those citizens who help facilitate their projects will be authorized, empowered, and legally defended in their use of deadly violence to enforce their mandates. Simultaneously, the fact that Rittenhouse's victims were white can function as a rebuttal against accusations of anti-Black racism in the legal system or at the core of Stand Your Ground laws, even as many manifestations of that same systemic anti-Blackness drive the narrative framework that enables Rittenhouse's acquittal.

Throughout the trial, moves are made to deflect the possible representation of Rittenhouse as a racistly motivated actor and cast the anticivil mark of racism elsewhere; for example, Joseph Rosenbaum is framed as an antagonist to the peaceful protestors, quoted as repeatedly using the n-word, though in reference to Rittenhouse and several of his white comrades. At several points in his questioning, Rittenhouse's defense asks Rittenhouse to recall the specific vulgarity graffitied on the outside of the high school that Rittenhouse helped to clean, as well as what Rosenbaum had been shouting at Rittenhouse and his cadre. In each case, Rittenhouse repeats the statement verbatim, right up until the appearance of the n-word, at which he innocently demurs, stating that he refuses to ever speak the word.

Whether or not Kyle Rittenhouse is personally a racist is entirely beside the point. However, his active performance as a vehement *non*-racist, and the support of this presentation by his defense, functions to deflect the suggestion that this case can be read with the same anti-Black lens as many other SYG cases, as a result of its location at a "Black Lives Matter" demonstration. The use of individual examples such as the Rittenhouse trial, presented as "nothing to do with race," to defend the notion that the court system is colorblind, perpetuates the very rhetorics that ignore (and at times actively veil) the innumerable ways in which racial

disparity is encoded into every level of the criminal justice system. If the immediate specifics of Kyle Rittenhouse's case are "not about race," the arguments used to defend him nonetheless strengthen and maintain the legal rhetorics that undergird Stand Your Ground legislation, which has been repeatedly shown to *increase* and disproportionately justify the murder of Black men.

Conclusion

These components of the logic in Rittenhouse's trial each serve to forward the claim that the American court system functions entirely on blind justice that does not privilege nor persecute any individual on the basis of their race. A case like Rittenhouse's, in which the victims are white, functions as a counterexample to the numerous accusations that Stand Your Ground laws work to disproportionately justify the murder of Black men. The absence of race-specific signifiers to define the character of Rittenhouse's victims does not preclude the perpetuation of the same structure of legal rhetoric that allows Black masculinity to be routinely marked as inherently threatening.

Thus, the three rhetorical moves that result in Rittenhouse's acquittal draw on a deep history of racialized legislation and litigation that deprive non-white actors the full access to fear, self-defense, and free movement throughout public spaces unmarked by the stigma of being a "threat." That Rittenhouse's defense was successful in utilizing these narratives to produce his acquittal upholds and renews the efficacy of their discursive power, and adds to the rhetorics another layer of protection against the accusation of racial bias. That is, if the central rhetorical moves common to Stand Your Ground trials are applicable in a case in which all victims are white, the rhetorics themselves must be entirely devoid of racial bias. Such a conclusion ensures that these legal narratives will continue to predictably produce acquittals in similar cases-- Stand Your Ground cases-- which are statistically more likely to involve the death of Black men and boys at the hands of white men and boys.

Kyle Rittenhouse's acquittal on the basis of his right to stand his ground and use deadly force against individuals he felt posed him immediate physical danger occurs as a result of the successful positioning of Rittenhouse as an honorary agent of the state, authorized to use legitimate violence against his victims, who are positioned as "bad men" whose characteristics make them (and the objects they carry) inherently threatening. Though all immediate participants in this encounter are white, many of the legal rhetorics that enable Stand Your Ground laws to be disproportionately utilized to protect the white shooters of Black men are evident in the Rittenhouse trial, and are bolstered by his ultimate acquittal. Tracing the semiotics of fear, threat, and justification utilized in court trials involving the use of violence offers insight into the rhetorical processes that maintain a legal landscape in which violence by some categories of citizens against others is predictably and consistently justified in ways that perpetuate the uneven distribution of legitimate violence.

IV.
The Semiosis of Sedimentation:
Applications in Pragmatist Cultural Theory

Introduction

The second cultural turn in Sociology looked to semiotics, linguistic structuralism, and hermeneutics to examine discourse and its social impacts (Reed 2009). A significant strength of this approach has been that it enables new ways of examining and problematizing the relationship between structure and agency, particularly the ways in which structures (so called) are variably reproduced and transformed or overthrown. Cultural theory's focus on signs and meanings has revealed an important problem to be explained: when, how, and why do signs get resignified and result in new and changed meanings? The rise of the concept of performativity in cultural theory offers a valuable entry-point into this issue by centering attention on the sites at which the possibility of resignification arose, whether or not the resignification actually occurred.

Performativity in sociology has primarily been approached from the perspective of either dramaturgy (Goffman 1959, Garfinkel 1967) or performative action (Alexander 2010). Though both attend to the process of performance and use the language of performativity, these two approaches build from very different background assumptions. While Goffman's dramaturgy stresses micro-interactional performances as keys to understanding behaviors distinct from historical and demographic comparisons, his dramaturgy is rooted in the idea of underlying structures of meaning that durably pattern how people interact. Actors inhabit roles that are, to some extent, preestablished for them, and follow patterned rules about when, where, and how those roles can be deviated from (in the context of the "backstage," for example). This is apparent in Goffman's account of "gender displays" (1976), wherein actors participate in various stylized behaviors that have encoded within them the indicators of hierarchy, romantic vs.

platonic interaction, subordination or respect, etcetera, that make up much of gendered interactional differences.

Especially when it comes to gender, Garfinkel takes a very similar approach in his description of Agnes' transition into womanhood. He describes a set of behaviors, norms of interaction, and cues for relational positionality that Agnes learned to embody in order to become a social actor recognizably playing the role of a woman. For both of these theorists, performance requires knowing the script-- in some situations a script may need to be consciously imparted, studied, and practiced, and in others the script may be inherited less consciously, through any number of embodied routines performed more or less from childhood, acquired through the mirroring of adults and the daily ordering of the body that parents (and teachers) perform on their children.

A newer approach to performativity has used the term to describe performative power-- the ways in which specific kinds of emotive displays manifest new power dynamics as a result of the timing, emotion, rhetoric, and affect of an actor's performance. This approach to performativity does not rely on the belief of pre-established scripts and roles, but rather highlights a generativity nascent in successful performances-- the generation of new roles, new scripts, and new conditions of power that spring forth from the performative act itself. Some theories of performativity, notably Alexander's (2010), weave elements of both established-script dramaturgy and generative performative acts into an account of performativity that simultaneously relies on pre-existing narratives rooted in the characteristics of the civil sphere to position characters favorably or disfavorably, and acknowledges that successful performances of these tropes can alter existing power relations and create new hierarchies.

Through these discussions, the relationship between structure and agency in the construction of subjects has been newly problematized. One approach can be broadly characterized as Bourdieusian, rooted in the examination of linguistic or performative events taking place within variably stable structural landscapes (Timmermans and Tavory 2020, Eliasoph and Lichterman 2003, Tavory 2016, Bourdieu 1998). On the other hand, other scholars have proposed that these structures and institutions themselves are constituted (and continually re-constituted) in the very acts of discursive and performative power that they are expected to contain (Reed 2020, Wagner-Pacifici 2017, Moore 2011). These theories have varied in their fidelity to the classic linguistic theories of Austin and Derrida. They have also varied in scope, with some focused on the mundane microinteractions that manifest the meanings of specific terms, organizational types, or personal beliefs (Lo and Eliasoph 2012; Tavory 2016), and others oriented more towards the kinds of public spectacles, events, or political negotiations that have (or have the potential for) dramatic public and political implications (Reed 2013, 2015; Gibson 2012; Vaughan 1996; Wagner-Pacifici 2000).

Importantly, these theories also vary in the extent to which they take a primary interest in the question of *power*. Not all studies into the ways in which meanings are generated, perpetuated, or transformed focus specifically on the ways in which those meanings exist within, and have the potential to alter, conditions of power. For example, the question of power is largely absent from Lo and Eliasoph (2012) and Eliasoph and Lichterman's (2003) careful attention to the ways that groups develop organizational styles and co-opt vocabulary with particular meanings according to a group's typification within a conceptual framework of similar organizations. The theories are ripe for use in examinations of power-- Eliasoph and Lichterman end their theory of culture in interaction by proposing that it might be particularly apt for studies

of how some religious groups become radicalized and terrorist organizations form. Nonetheless, these authors do not explicitly describe the processes they identify as being themselves arms of power at work.

This pragmatist turn in cultural sociology has produced a number of compelling methods for "reading" individual events of different scales and identifying the various components that produce the observed outcome of the incident. Such analyses make explicit the claim that the specifics of what we say, how and when we say it, and how it is taken up by those to whom we say it are wildly consequential, not just for the kind of world-shaking transformations that can and do result from situations like the Challenger launch decision or George W. Bush's declaration of the attacks on the twin towers as acts of terrorism that instigate war (Wagner-Pacifici 2017, Vaughaun 1996), everyday interactions that result in changes in understood meaning (Lo and Eliasoph 2012), but also when the result of the interaction is *not* a transformation, but the continuation and concretization of existing narratives (Moore 2011).

Linguistic specificity is often paramount to the outcome of a given interaction, and can shine light on some of the mechanisms at work in the encounter itself, but there are limits to the extent to which the examination of internal language can explain the outcomes that result from the interaction. Austin (1962), Derrida (1978), Butler (1997), and Bourdieu (1991) have all argued about the limits of the performative capabilities of language-- that is, what "really" creates the outcomes produced when certain speech acts occur, and whether language itself can be reasonably said to have a performative power. Reed's (2013) categorization of the relational, discursive, and performative dimensions of power offers a pragmatist approach to these debates, setting aside the question of *where* the performative power of an utterance resides (whether in the words themselves, the speaker, the context of the speech, etc.) and instead proposes that

interactions under conditions of power can be parsed according to three different dimensions of power at work in the situation. The comparative “weight” of each dimension becomes an empirical question in each case.

So, then, what is the relationship between the performative, discursive, and relational dimensions of power, and how do they interact and overlap within a given encounter? Reed’s alteration to Lukes’ (2007) account of the variable dimensions of power offers a valuable framework for specifying some of the questions at stake in the literature highlighted above. Identifying and distinguishing between power’s dimensions, particularly when it comes to articulating and analyzing the performative dimension, is an important tool towards the project of disentangling events and other moments of apparent increase in micro-contingency from macroscopic stabilities, whether the outcome produced is a radical transformation or the maintenance and continuation of preexisting narratives, or a more subtle middle-ground between the two.

In this paper I pursue a semiotic account of how structures (or “macroscopic stabilities” to use Abbott’s (2001) language) are durably reproduced, without falling prey to several tendencies in previous approaches: a) an overly uniform assumption about the durability of structures that either forecloses the possibility of explaining change *or* does not account for the fact that many patterns of action are quite durable, b) a reification of ‘structures’ that fails to dissect them into patterned mechanisms, or attends to only one category of such mechanisms at a time, as opposed to the relationships between them, and c) the failure to relate the contingent negotiations of meaning that take place in the microinteractions of the everyday with the question of power, in each of its dimensions. Various scholars have used the geological metaphor of “sedimentation” to describe the processes by which repeated action and

interpretation become calcified into structures of predictable, reliably patterned meanings and effects (Butler 1997, Eliasoph 2007, Ricoeur 1991). I propose a reclamation and recontextualization of the concept of sedimentation as a way to negotiate the relationship between discursive and performative power.

This article proceeds as follows. In the first section, I highlight an idiosyncrasy in Reed's theorization of power's dimensions in *Power in Modernity* (2020). In laying out his conceptual framework in an early chapter, Reed draws a sharp distinction between situations in which performative power is dominant and new relations and significations obtain as a result, and those in which performances are merely "parasitic upon" discursive power and reproduce existing discourses. Though he draws heavily on Butler and Austin's understanding of performative utterances in other parts of his analysis, this dichotomy between performative power and discursive power diverges sharply from previous semiotic approaches to performance. This divergence presents a question unanswered in *Power and Modernity*: how are discourses propelled forward, and what differentiates those that experience change from those that remain constant?

One of the causes of this theoretical predicament is that Reed primarily conceptualizes performative power at work in situations in which radical change is occurring. In this section, I note alternate approaches to temporality, such as those found in Abbott (2001) and Moore (2011), that emphasize the extent to which performative action is at play in a variety of circumstances where dramatic change does not occur. To expand this discussion, I turn to Bourdieusian approaches to the relationship between performative action and social reproduction, unpacking Bourdieu's own account of performative power, through his reading of Austin and Derrida, which I argue is infidelitous to Austin and Derrida's original claims.

In the following section, I forward the concept of sedimentation, as used by Butler, Riceour, and Eliasoph, as a way to theorize how predictable discourses (and thus, structures) are made up of acts of performative power, repeated, and cited for authority, and how changes, of various extremity, in those discourses result from performative moments of resignification. Finally, I revisit Reed's understanding of power's discursive and performative dimensions through this new lens and offer some applications for the sedimentation approach.

Discursive Power, Performative Power

In a move to centralize three of social theory's most influential epistemologies of causality, Reed (2013) proposes a framework of three dimensions of power: the relational, the discursive, and the performative. This approach to thinking about power dimensionally stems from Lukes' (2007) insight that a single source of power could be analyzed as having nesting dimensions, each with a specific function contributing to the outcome in its own way. In particular, Lukes argues that previous approaches to power did not take into sufficient consideration the processes that determine what issues appear debatable in the first place, and how entire populations come into their beliefs, preferences, and desires. Reed identifies the dimensions focus of power exemplified by Lukes as a response, or addition, to two other primary debates about power in social theory: the debate over power *to* vs. power *over,* and discussions concerning the various *sources* of power (Mann 1986).

The relational, discursive, and performative dimensions of power highlight ways that power functions in a given situation, with the idea being that all three are present, to varying degrees and in varying configurations, in most situations that occur under conditions of power. The relational dimension pertains to the web of relations between people-- whether the patterned

hierarchies that establish expected differences between teacher and student, or the more horizontal relationships made up of things like expectations of gift reciprocity that might put one person in the informal debt of their neighbor. The relational dimension of power also includes factors traditionally considered elements of force: that a policeman has a gun and the civilian doesn't mark one element of the relational dimension of the power situation that exists in their interaction.

The discursive dimension of power describes the effect of signification, narrative, and interpretation on the outcome of an interaction. Presenting particular values as universal, offering one interpretation of an ambiguous sign as the primary or singular possible interpretation, or framing an issue in such a way that some of its components are distorted or ignored as unimportant are ways that power's discursive dimension manifests. The way that talk and signification direct understandings about what is important, true, meaningful, or obvious are elements of the discursive dimension of power.

The third dimension is the performative, which Reed identifies as the most in need of further attention in social theory, since it has been the least theorized up to this point. Temporality is one important element of the performative dimension. The order of events, the timing of specific outbursts, the pace of the elements in an anticipated sequence all affect the success or failure of particular goals. Other elements of the performative involve displays of affect, unexpected behaviors that complete familiar patterns in unfamiliar ways, speeches or actions that capitalize on or express the feelings of a crowd that hadn't previously been identified.

Reed presents his three categories of power's dimensions as a starting place for a pragmatic framework that springboards off of Lukes' dimensional approach to power. He

acknowledges that the relational, discursive, and performative dimensions of power ought not be understood as entirely all encompassing. That there are other dimensions crucial for analysis is quite possible. Further, these dimensions are not present in equal measures or configurations in all situations. The extent to which each dimension contributed to the ultimate outcome, and how those dimensions interacted with each other to produce that outcome is an empirical question in each situation. Reed differentiates his approach to power's dimensions from Lukes' theory of the same by distancing himself from the normative core of Lukes' theorization. Rather than rooting his approach to power in the concept of interests and their variable manipulation, Reed seeks an analytical categorization that expands our ability to describe various causal images of the world with increased specification and differentiation. This framework of power's three dimensions provides a valuable lexicon for distinguishing between various categories of effect that influence action.

Reed engages with both Bourdieu and Judith Butler's approaches to power and identifies the extent to which the dimensional approach overlaps or diverts from each. He recognizes the ideas of the relational and discursive dimensions in Bourdieu's depiction of symbolic and social elements of the strategies actors employ to make moves within their fields, while distinguishing this aspect of Bourdieu's work from the discussions of fields that largely constitute an example of the "sources of power" axis. Reed argues that conceptualizing performative power as analogous to illocutionary speech acts (Butler 1997, J.L. Austin 1962) and "specifically *not* as a retread of structure versus action" (207) is one of the significant theoretical benefits of the framework he presents. However, while he seems to view the dimensional approach to power, with a focus on the undertheorized performative, as a way *around* the question of structure versus action, I think it has the potential to offer a useful way *through* the question.

Adam Moore's (2011) intervention into the implications most of the eventness literature has for creating assumptions about change and meaningful incidents at the cost of being able to explain stability and durable signs draws necessary attention to the processes by which existing identities, narratives, and significations are maintained and reinforced. He argues that a primary focus on dramatic events that trigger sudden transformation fails to explain how so many narrative structures appear to remain stable much of the time, or how those structures shift subtly across many "micro-events," rather than exploding in sudden change. Reed hints at this issue when he acknowledges the need to question what factors contribute to the success of some performatives and the failure of others to create meaningful transformation, even in cases where the change is gradual and slow. Following Butler, he points to various possible explanations for the successful reclamation of the term "queer" from an insult to a term of pride (or even neutral description), and acknowledges that not all performative attempts to reclaim insults are successful, and that we might search for explanations for their variable success in examining the relational and discursive dimensions of power at play in the situation. That is, the performative is not always particularly significant in a situation-- some actions that appear to be performances do actually make change as a result of the performative dimension of power, and not all events have performative dimensions as central to their outcomes.

In this description, Reed draws from Sewell's approach to events, using as his example Sewell's depiction of the storming of the Bastille as "inventing revolution." This example draws out one of the weaknesses in Sewell's approach that a dimensional framework for examining power is better able to address: namely, explaining the variation in the success of some performance rather than on others by attending to analysis of all three of the dimensions at play. However, Reed does not attend to the issue with this approach that Moore raises. In his original

framework, performative power is primarily visible in moments of dramatic change, particularly where novel interpretations and significations are produced, as in his examples of "the founding act of a constitution that establishes legal order," or "the constructive innovation of form in a literary work" (210). While Reed's attention to performative power as he describes it is certainly much needed for empirically examining these kinds of transformations or dramatic creations, his description leaves little room for exploring the role of performative power in the maintenance and indeed creation and recreation of the relational and discursive dimensions.

Reed (208) writes "in many situations, macro-performances are parasitic upon, or merely 'express' relational and discursive power. That is, a 'performance' takes place, but very little, if any, performative power is exercised." He gives as an example of this phenomenon the US president's State of the Union address, which is certainly a dramatic public performance, but very rarely elicits any meaningful change in action or opinion whether of the citizenry nor certainly of Congress. Moreover, what change may circumstantially occur in Congress following the address can likely be traced through various elements of the relational and discursive power that define the political context in which the address takes place. Reed's larger point here is well taken: first, not all social performances involve much performative power-- the two are separate phenomena, and second, there is great variation in the extent to which performative power succeeds, which is to say, occurs at all. These are valuable insights and Reed highlights important empirical questions that a dimensional approach to power is particularly useful for answering. We are right to be wary of the temptation to call any successful production of action "performative power" -- after all, it is exactly this kind of generalization that Reed's dimensions of power allow us to distinguish into their more specific elements.

It is for this reason that Reed builds off of Derrida, Austin, and Butler to define performative power as analogous to illocutionary speech acts-- performative power does not describe performances in which relational and discursive power are referenced, mimed, described, or predicted. Rather, it describes a distinct dimension of power that obtains *in and through* the performance itself. Given this foundation for his theorization of performative power, it is surprising that Reed would limit the effects of performative power primarily to moments of change or novel creation, dismissing the maintenance of existing structures as "parasitic upon relational and discursive power." I argue that the utility of a dimensional approach to power, and particularly the great value of theorizing the performative dimension, can be enhanced by a deeper understanding of performative power's many contexts, through closer adherence to the semiotic theory from which it was born.

Events, Structures, and Performative Power

Though the semantics of language have been given variable attention, symbolic frameworks, narrative, and meaning have been generally understood as central elements of structure, and thus crucial to understanding its change. One approach to the question of social transformation vs. stability has centered around the study of events and their effect on the narratives and meanings that shape everyday life. While the groundbreaking theories of the relationship between structure and events authored by Sahlins and Sewell share much in common, Sewell modifies Sahlin's theory of structure by insisting that a view of structure almost entirely understood as a symbolic system fails to sufficiently account for agency and change, especially in cases where symbolic systems are less autonomous than those on the islands Sahlins studied appeared to be (Sewell 2005; Moore 2011). Sewell argues that in order to leave sufficient space for the possibility of agency and social change, structure must be understood as a combination of symbolic system and available resources. Sewell maintains Sahlin's insight that

events are necessarily born out of, and, importantly, defined and interpreted through, the structures that exist around them, even as those structures are shaped and transformed by individual actions and events (Sahlins 1985). However, he produces a more agile theory of events applicable to many kinds of societies by insisting on the plurality of symbolic systems even within any given society, and the role of resource availability in the formation of events as such.

Though Sewell's modification of Sahlin's approach produces a more flexible theory of events capable of accounting for change, Moore (2011) notes several remaining weaknesses in theories stemming from this approach. For one, Moore questions the approach to social change that views it as "lumpy" (Sewell 2005), more likely to take place in short bursts than in slow, subtle shifts over time. Relatedly, he pushes back against the impulse to focus on events as moments of "transformation." Picking up the loose thread of Sewell's recognition that stability and social continuity is a complex phenomenon in need of analysis and explanation, Moore notes that "structures -- or what Abbott more aptly refers to as 'macroscopic stabilities'-- are social states that are achieved just as much as are structural transformations. Recognition of this fact places emphasis on the 'maintenance work' necessary for the emergence and reproduction of stable social orders" (Moore 304). While Moore acknowledges the crucial work done by, for example, Giddens, and Goffman, towards theorizing various processes of social maintenance and the reproduction of identities and hierarchical orders, the novelty of his contribution lies in the claim that *events,* traditionally seen as definitionally the antithesis of stability, can themselves be important parts of the processes of social reproduction. Drawing on Turner's (1974) account of social dramas that begin with a breach in normal practices, Moore suggests that events are half of an essentially reciprocal feedback loop, the other half of which is narrative. Cultural narratives

about identity and the kinds of actions that are appropriate or normal help to construct the ways that we identify events by differentiating them from everyday activity. Meanwhile, the process of identifying and experiencing something as an event can shape those same narratives.

Identifying the importance of narratives in constructing and experiencing events, Moore turns to Ricoeur to draw attention to the details that determine the relationship between existing narratives and events. Drawing upon Ricoeur's depiction of the plot as "[mediating] between the event and story" (Ricoeur 1991, cited in Moore 2011), Moore argues that "events differ from mere occurrences in that they contribute to the progress of a narrative. They become, in effect, points in the plot that either carry the story along a preexisting narrative arc or signal a change. In other words, they are not only experientially but also semantically significant happenings" (306-7).

He continues, "the transformative or reproductive effect of specific events is shaped by how their eventfulness and significance comes to be interpreted, a dialectical process that is never predetermined" (307). While this is an important contribution to the theorization of durability, transformation, interpretation, and the relationship between the three, Moore's attention to the possibility of events as crucial facilitators of the continuity of narrative structures raises a number of further questions. For one, by what mechanisms does this reproduction take place?

In the past several decades, the pragmatist turn in cultural theory has produced a number of compelling methods for "reading" such an interaction and identifying the various components that produce the observed outcome of the incident. Timmermans and Tavory (2020) identify some of the specific linguistic patterns in which racism manifests in everyday interactions; Moore (2022) draws attention to the temporal dimension of signification in interpreting disputed signs; and Vaughan (1996), Wagner-Pacifici (2017), and Gibson (2012) come to differing

conclusions about the ratio of what is predetermined by already-existing social scripts and what is malleable according to the minute specificities of the case at hand in conversations that must result in life or death decisions under severe time constraints. Such analyses make explicit the claim that the specifics of what we say, how and when we say it, and how it is taken up by those to whom we say it are wildly consequential, not just for the kind of world-shaking transformations that can and do result from situations like the Challenger launch decision or George W. Bush's declaration of the attacks on the twin towers as acts of terrorism that instigate war, but also when the result of the interaction is *not* a transformation but the continuation and concretization of existing narratives.

Abbott (2001) raises a somewhat similar concern in his exegesis on the prevalence of "turning point" vocabulary in historical sociology. Recognizing "turning points" as a narrative production rather than a measurable feature of "trajectories," Abbott cautions against the identification of turning points in historical timelines, particularly when attached to causal explanations, in part because such identifications can only ever be imprecisely located in time. If all turning points must be points, moments in which change cannot be instantaneously occurring, but moments that nonetheless seem to precede new patterns distinct from those that came before them, the question that remains is "how it is that *they* get started? This start must take place at a moment, and yet it would seem that given normal ideas about causality, an instant cannot see the production of enduring change. Similarly, since choice processes take place moment to moment, it is not clear how they can give rise to turning points, since we have defined those as necessitating reference to two points in time, not one" (254).[11] Abbott references Zeno's

[11] Ricoeur (1991) makes a similar statement: "One can say that two kinds of time are found in every story told: on the one hand, a discrete, open, and theoretically undefined succession of incidents (one can always ask: and then? And then?); on the other hand, the story told presents another temporal aspect characterized by the integration, the culmination, and the ending in virtue of which a story gains an outline" (427).

paradox of the arrow that is static in any given instant, but is clearly in motion across time, noting Newton's response to this paradox: "It is possible to explain reproduction as a phenomenon sometimes produced by perpetual change; it is not possible to explain change as a phenomenon sometimes produced by perpetual stasis" (254).

In order to answer this question, Abbott turns to network analysis made up of decisions and interactions that take place always and ever in the *present moment,* and never as points in a solidified "structure" that moves from past to future. However, a theorization of performative power is a viable alternative to this solution. Failing to take seriously Abbott, Moore, and Riceour's respective insights about the nature of events leads to the potential of a framework in which it could be said that discursive power is at play when an interpretative narrative is perpetuated or maintained, while performative power is credited for changes to discourse. The weakness of such a framework is that it cannot explain how and why some discourses change over time, while others continue as they were, nor can it explain why performative power suddenly erupts to transform some discourses and not others.[12] One possible solution to this problem is Abbott's network analysis approach, but this approach is not particularly conducive to maximal cultural interpretation (Reed 2011). An alternate, though not incommensurate, approach returns to the semiotic roots of Reed's conception of performative power. If structures are understood as both action *and* interpretation, then the semiotic concepts of iteration, citation, and sedimentation allow discourse and performativity to be linked through narrative continuity created and variably sedimented through instantaneous interaction. In the following section I

[12] One of the strengths of Alexander's (2010) and Reed's (2013, 2020) theorizations of performative action and performative power, respectively, is that they offer sound explanations for why performances may or may not be successful and why performative power may or may not obtain (drawing on Bourdieu as well as Austin). Nonetheless, this explanation is not the same as an explanation for how to classify an act as performative, except for by its potential to produce change.

trace these concepts and their application to performance and social reproduction, as argued primarily by Bourdieu, Butler, Austin, and Derrida.

The Structure of Performance/ The Semiosis of Structure

Bourdieu's approach to mediating the relationship between structure and agency in accounting for human action is a materialist account that aims to explain the durability of particular patterns not only of action but of preference in groups of individuals that share socioeconomic indicators. He writes that:

> The conditionings associated with a particular class of conditions of existence produce *habitus,* systems of durable, transposable dispositions, structured structures predisposed to function as structuring structures, that is, as principles which generate and organize practices and representations that can be objectively adapted to their outcomes without presupposing a conscious aiming at ends or an express mastery of the operations necessary in order to attain them. (Bourdieu 1990, 53)

This "generative structuralism" (Harker, Mahar, and Wilkes 1990; Vandenberghe 1999) is a hallmark of co-determinism that attempts to avoid the pitfalls of positing structures as static entities that entirely preexist the actions of acting subjects and instead function primarily as the frameworks that bound the possibilities of action for those subjects. "Structured structures predisposed to function as structuring structures" offers room for the possibility of self-regeneration and perpetuation, and even for the possibility of transformation, albeit within the boundaries pre-established by the very structure being transformed.

As Gorski (2013) insists, positing Bourdieu primarily as a theorist of reproduction belies his repeated focus on explaining social transformation and the invention of new categories of

sociality, as especially visible in *Algeria 1960, The Rules of Art,* and *Homo Academicus*. As opposed to the rote reproduction of which he is often accused, Bourdieu can be read as offering a theory that acknowledges transformations in some values and distinctions as a necessary way to preserve others, and that the aesthetic bases of cultural capital, for example, are not temporally consistent, but instead experience great transformations over time, resulting in alterations to interests and actions in order to ultimately maintain a relatively stable social positionality.

Despite this important reminder about the role of transformation in Bourdieu's oeuvre, Bourdieu's accounts of transformation are nonetheless rooted in the characteristics of pre-existing social structures-- structures that involve and perhaps even require mechanisms that instigate change, but are still opposed to performative theories of action. One of the ways that Bourdieu's underlying structuralism manifests is in his response to Austin (1962) and Derrida's (1978) performative theories of language. Bourdieu harshly repudiates the possibility of a performative power residing in language itself, and instead insists that language at most *represents* power and authority whose sources exist in the durably structured relations that pre-exist any communicative act. He writes: "the power of words is nothing other than the *delegated power* of the spokesperson, and his speech-- that is, the substance of his discourse and, inseparably, his way of speaking -- is no more than a testimony, and one among others, of the *guarantee of delegation* which is vested in him" [emphasis in original] (Bourdieu 1991, 107). For Bourdieu, the felicity of language's performative action relies almost exclusively on the rightness of the speaker, that is, the authorization of the speaker as the one to whom the speech act in question is delegated.

This authorization is composed of two primary elements: the specific positionality of the speaker in various hierarchies, and a variety of social conditions that prime the interaction with

the prerequisites for a completed performance. Thus, Bourdieu writes, "perhaps the most important thing to remember is that the success of these operations of social magic -- comprised of *acts of authority,* or, what amounts to the same thing, *authorized acts*-- is dependent on the combination of a systemic set of interdependent conditions which constitute social rituals" (111). For Bourdieu, authorization always pre-exists the speech act or social interaction, and thus stems from structured conditions outside of the interaction, within which the interaction occurs. If this is so, the possibility of authorization obtaining *through* the performance of a speech act is always already entirely foreclosed.

Bourdieu's critique is of both Austin and Derrida's approaches to the performative power of language, but he tends to collapse the two into each other. Distinguishing between Austin and Derrida's understandings can shed some insight into the phenomenon Bourdieu denies.

In Austin's (1962) delineation of speech categories, he spends much time elaborating on the illocutionary performative: words and phrases that do not simply describe or foretell an action, but perform that action with their utterance. The classic example is of the clergyman who in declaring "I now pronounce you husband and wife" manifests the marriage into being. The couple is not married before the utterance, but becomes married through the utterance. Other examples of illocutionary acts include "I promise," "I baptize," or "I wager." In Austin's framework, repetition, and specifically convention, are central to the function of illocutionary acts.

In order for an illocutionary performative to be successful, it must be performed within the right context, by the right actor, and according to the right procedures. The intricacy of these requirements varies according to the kind of illocution. Promises and wagers can be made by many kinds of people, in many kinds of circumstances, though their sincerity and the potential

for their fulfillment may be subject to greater specificities. On the other hand, many illocutionary acts, like marriages, baptisms, or boat christenings are rituals that require a number of elements in order for the utterance to perform the act which it intends. In either case, Austin describes illocutionary acts as formulaic: when all of the variables of the formula are present, the deed is performed.

Austin's approach to illocution is in this way very similar to Bourdieu's account of successful performance. While Bourdieu insists that the accomplishment of a deed like marriage or baptism relies almost entirely on social positionality such as authorized actors and appropriate physical and temporal contexts, external to language, these specifications are already present in Austin's account. Bourdieu is correct in that Austin spends little to no time elaborating on the perpetuation of the clergy, or the social process of authorization. Nonetheless, Austin's assumption of (a) their existence, and (b) their reliable continuity as inherent, is implicit. Though Austin's focus is the description of the category of language used in such performative rituals, there is little in his understanding of context contingency to contradict Bourdieu's position.

Bourdieu's (1991; 109) criticism about the "power of linguistic manifestation" is a more accurate critique of Derrida's interpretation of, and departure from, Austin. Derrida differentiates a sign's structural features from its semantics, and is preoccupied with the seemingly infinite iterability of the former. That is, signs come into existence as differentiated and recognizable units primarily through their repetition. Every instance of a sign (like a word) cites all previous stances of that sign, thus giving it a recognizable form in its distinction from other signs. The iterability of a sign lies only in the unlimited potential of that sign to be structurally reproduced. This potential for unlimited iteration is for Derrida the core of a

performative act. If a sign can be repeated over and over, its structure must not be contingent on the contexts or meanings of its previous uses. The sign must be recognizable in any context, and be capable of taking on any number of meanings. For Derrida, the power of the performative obtains when a sign breaks free from its prior manifestations and demonstrates its iterability distinct from the contexts and meanings of its previous uses.

As an example, the focus of Derrida's interest is present in the very *first* time an Elvis impersonator declared "I now pronounce you husband and wife" in the lobby of a Las Vegas casino. That moment, for Derrida, demonstrates the structural iterability of the phrase, in the fact that a legal marriage did indeed obtain, despite the absence of a clergyperson, or near any other contextual similarity to previous marriages. Thus, "that force of the performative is not inherited from prior usage, but issues forth precisely from its break with any and all prior usage. The break, that force of rupture, is the force of the performative, beyond all question of rupture" (Butler 1997; 148).

It is on this point that Butler moves beyond the extremes of Derrida's belief that a rupture from prior context is a necessary element of all marks that function as performatives, and Bourdieu's failure to fully account for the possibility of transformation in contexts and new authorizations from which transformation might spring forth. Here, Butler is worth quoting at length:

> The sense of convention in Austin, augmented by the terms 'ritual' and 'ceremonial,' is fully transmuted into linguistic iterability in Derrida. The social simplex notion of ritual, which also appears in Althusser's definitions of ideology as a 'ritual,' is rendered void of all social meaning;

> its repetitive function is abstracted from its social operation and established as an inherent structural feature of any and all marks. Bourdieu, on the other hand, will seek to expand the 'ritual' sense of 'convention' and exclude any consideration of the temporality or logic of performativity. Indeed, he will contextualize ritual within the social field of the 'market' in order more radically to exteriorize the source of linguistic power. (150-1)

Instead, Butler argues that in order to "arrive at an account of the social iterability of the utterance" (150), we must take seriously moments of successful rupture, of the partial transformation of the meaning or function of a particular sign.

Bourdieu insists so heavily on the force of social structures in determining the success of a performative, that he leaves no room for the possibility that one might become authorized to perform an act *through* a performative act, rather than necessarily by pre-authorization. This offers no space for an account of transformations in the social contexts and authorized actors that enable performative success. Derrida, on the other hand, insists that performative force resides in *all* marks as the potential for their complete divorce from all previous uses (in the complete opposition that he draws between the structural and the semantic). This approach offers no systematic mode of accounting for the difference between socially successful performatives and those for whom the desired results fail to accrue. Both Austin and Derrida do give accounts of the possibility of performative failure: Austin's, like Bourdieu's, is primarily circumstantial, while Derrida's is rooted in the ultimate arbitrariness of all signs. But Butler argues that neither

of these offers a real explanation for how it is that some breaks from structural contingency do not result in transformation, while others produce a new mode of signification for the given sign.

In explicating the differences between, and weaknesses of, Austin, Derrida, and Bourdieu on this subject, Butler establishes her own concept of iteration as rooted in citationality. A citation is inherently a balance of perceived differences in the distance between the original which is being cited, and the citation itself. In order for an utterance to be recognizable as a repetition of a sign, it must be near-identical to that which it intends to recreate. However, true identicality can never be accomplished, because a citation is constituted by the distance between itself and its original-- if there were no distance there would be no citation, only the original itself. Thus, an inherent characteristic of iterability, for Butler, is this delicate balance of resemblance and distance from previous uses of a sign.

In this way, while the example of the very first Elvis wedding demonstrates the Derridean iterability of a sign-- the way in which "I now pronounce you" was, as a linguistic unit, recognizable and indeed functional in a context entirely distinct from its previous uses, the case is more exemplary of Butler's conception of iteration than of Derrida's. Derrida's approach to iteration is, generally, uninterested in felicity, or in the success or truth value of a performative. For Derrida, my statement of "I now pronounce you husband and wife" to two rocks in my back garden is as much an iteration of marriage as any a priest has ever performed, given that the linguistic structure is the same. (He does not claim that these have the same social effects-- rather, he is largely uninterested in iteration as a process related to social effects.). It is this lack of pragmatic social nuance that Bourdieu, and Butler, criticize in Derrida. Butler's approach to iteration offers some useful structure for reigning in the Derridean possibility of limitless iteration untethered to meaning or social outcome.

Here a word Butler uses several times captures one of the cornerstones of her approach to the concept. Butler writes that with every successful performative utterance to which the desired results obtain, the structure of the utterance becomes *sedimented*. In this context, her use of structure is more akin to Bourdieu's than to Derrida's-- that is, social structure as opposed to linguistic structure. Sedimentation is an element of iteration largely absent from the concepts of Derrida and Bourdieu. When Butler refers to sedimentation, she invokes a slow, repetitive process of thickening, whereby the thickened structure becomes more and more durable as a result of its heft. Importantly, this durability is not equivalent to a resolute resistance to decay or transformation.

In *Bodies That Matter,* Butler writes "the process of that sedimentation or what we might call materialization will be a kind of citationality, the *acquisition of being* through the citing of power" (Butler 1993, 15; quoted in Bell 2007, 18). Vicki Bell comments, "while each citation is 'anew,' therefore, it is always constrained in advance by the power/knowledge relations that arrange both the conditions of possibility-- and in that sense 'precede' without being causal in relation to the performance (since they are only ever sustained through the performance)-- and the structures of intelligibility that surround that citation" (18). However, Butler's specific use of the word sedimentation resists the suggestions that all citations are "constrained in advance by the power/knowledge relations"-- in fact, it is on this point that Butler deviates from Foucault, while Bell's reading aligns them more closely than I think is warranted.[13]

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[13] Bell (2007) traces the line from linguistic theory to power critique through the suggestion that Butler's gender theory utilizes Austin's insistence that successful performative utterances do not rely on any interior "performance" or belief, but function purely through the act of the utterance itself. Through this analogy, Butler can be read as arguing that gender exists through the acts that appear to "demonstrate" it-- there is no interiority to gendered subjectivity, or at very least, there is no interiority as existing *prior to* gendered subjectivity as both expressed and manifested through bodily acts. In her summary of *Gender Trouble* in *The Psychic Life of Power* (1997b),

Sedimentation is a filtering of a fluid material through an established structure, which is shaped by, and indeed constructed through, the accumulation of the fluid material. This metaphor has a number of useful characteristics. First, it allows for the insight that social phenomena that appear to be structurally sound do not preexist interactions or speech acts, but are constructed out of speech acts, the amalgamation of speech acts repeated in near-identical, recognizable structure in a multitude of contexts, as Derrida describes. Second, sedimentation allows for the explanation of a change in trajectory. As social interactions accumulate in expected patterns, calcifying their recognizable shape and expanding its application across various conditions, a moment of unexpected, but successful, deviation from the original pattern creates a bump in the sediment-- as interactions continue to accumulate around this deviation, the shape of the structure is altered, and becomes less recognizable as the original the more accumulation takes place. What was only a small bump when covered by a few layers of

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Butler writes "the performance of gender retroactively produces the effect of some true and abiding feminine essence or disposition, so that one cannot use an expressive model for thinking about gender. Moreover I argued that gender is produced by ritualized repetition of conventions, and that this ritual is socially compelled in part by the force of a compulsory heterosexuality" (144). After quoting this passage, Bell offers her own summary: "Gendered bodies do not express gender difference, in other words, but --to use Austin's resonant phrase -- *indulge* in it; gender must be seen as a continuing series of actions, behaviors, gestures that occur in relation to conditions of the present, not a propelling force emanating from within the body. This 'indulgence,' therefore, is a series of actions performed under conditions of compulsion, constrained by the particular assemblage of power/knowledge relations within which it takes place" (17).

While this interpretation of Butler's meaning helps smooth the distance between Butler and Foucault's respective approaches to power, and captures some elements of Butler's turn to idealism in her later works like *Precarious Life* (2004) and *Frames of War* (2009), reading Butler with an emphasis on "actions performed under conditions of compulsion," and suggesting that those actions are "constrained by the particular assemblage of power/knowledge relations within which it takes place" overemphasises Butler's position on the durability of patterned action. Moreover, such a reading glosses over one novel element of Butler's concept of performativity that is often overlooked in Sociology: the relationship between iteration and generativity. Bell's reading of Butler's normative impetus toward the critique of power regimes shifts emphasis away from the core of Butler's conception of performativity as rooted in linguistic theory.

material becomes a huge hill when many, many layers with the same variation have developed on top.

Ricoeur (1991) uses sedimentation in a similar way to describe tradition (particularly literary tradition) as a narrative process. He writes "tradition [is] a living passing-on of innovation which can always be re-activated by a return to the most creative moments [...] The shaping of a tradition in effect rests on the interaction between the two factors of innovation and sedimentation" (429). Eliasoph (2007) quotes this passage in her own usage of the concept: "the rules change under pressure of innovation, but they change slowly and even resist change in virtue of the sedimentation process… the rules that together form a new kind of grammar direct the composition of new works- new before becoming typical" (Ricoeur, 430, as quoted in Eliasoph 2007, 74). Ricoeur highlights the extent to which sediment is variably durable, insisting that the mark of the old pattern will always be found in the new, strengthened by the applicability that it finds in fresh contexts (a concept that harkens back to Derrida's account of signs' iterability).

Importantly, this process does not destroy the base of the structure. Likely, a deviation from the expected pattern does not result in a dramatic change in the structure. The layer that contains the deviation strengthens much of the pattern surrounding the one modification, and the layers of meaning that stack on top of the deviation often soften the anomaly so that the patterned structure remains largely unaffected. In the case that the deviation is not a singular occurrence, but triggers the repetition of the new, slight variation from the old pattern, the structure will begin to take a new form, as each new layer is added, until it no longer resembles the original. Even in this scenario, the fragment of sedimentation formed by the original pattern buttresses the new formations, supplying the support of precedence necessary for the new pattern

to obtain durability. This process simultaneously increases the durability of the original, while creating space for an increase in variations from its original.

The first Elvis wedding is a prime example of sedimentation, because it captures at once the moment at which a successful performance accrued at the margins of what could be considered the pre-authorized context for felicity, as well as the repetitive process by which that context *becomes* authorized, the act of authorization that can serve as the reference point for the "pre-authorization" of the next citational act. That is, we can see both the influence of the sedimented tradition, as well as the new interpretation that offers itself for incorporation into the now-slightly-altered discourse.[14] In an Elvis wedding, when "Elvis" asks "do you promise to always be her hunka hunka burning love?" and the groom responds "uh huh huh," the original structure of marriage is not eroded. Rather, many elements of its previous structure are maintained, and, importantly, reinforced, lending recognizability (and thus efficacy and legitimacy) to the deviation, and ensuring the maintenance of the base structure so that it is available to provide this support to future performances.

Such a wedding is recognizable as a wedding because it maintains many of the same formal elements of church weddings: it occurs in a "chapel" (or a room designated thus within a casino), and the statements exchanged, while rather dramatically distinct from the phrases used in church weddings, do adhere to the general form of an Angelo wedding. The service contains a call and response wherein the officiant asks each member of the couple to confirm an intention of commitment to the other, to which each responds in the affirmative. Thus, the wedding perpetuates the traditional formula for participatory exchanges of equal commitment, even as it

[14] The "re-activation" Ricoeur describes highlights the extent to which the sedimentation metaphor allows for the recognition of performative action.

fills new variables into that formula. As a result, all subsequent Elvis weddings cite for their legitimacy the precedence of the first, a citation always buttressed by *its* citation of the normative wedding formula. Rather than degrading the durability of the traditional wedding structure, the development of Elvis weddings increased that durability by expanding the possible manifestations of the original formula, thus increasing the number of possible conditions under which a successful citation could take place.

Butler applies the concept of sedimentation particularly to the specifics of bodily comportment involved in her theory of gendered subjectivity. Here Butler and Ricoeur speak very much the same language. Ricoeur writes: "To sedimentation we ascribe the models that constitute in retrospect the typology of compositions which allows us to order [...] genres; but we must not lose sight of the fact that these models do not embody eternal essences; they derive from a sedimented tradition *whose genesis is obliterated*" [emphasis added] (429). For Butler, gender works in precisely the same way. She pays special attention to the extent to which the process takes place through the construction and imbuing of gender, as in the example of the doctor who declares, at the birth of a child, "it's a girl!," effectively "girling" the child, and setting her on a path of subsequent girling that will cite this declaration by the doctor as its origin. This moment, Butler argues, creates the appearance of the doctor as the authority from which the original girling springs forth, obliterating the genesis of gender, to use Ricoeur's language.[15]

The fact that this example would have to be modified for childbearing in the 21st century bolster's the distinction between Bourdieu's understanding of authority as the root of successful performance, and Butler's insistence on performative action as *generative* of authority. Today,

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[15] In other places, Butler calls this "the copy for which there is no original" (Butler 1990).

all but only a select few parents know the sex of their child long before birth-- the moment at which the doctor declares "it's a girl!" now occurs much earlier in pregnancy, as a result of ultrasound images. Because the sex of most babies is determined via ultrasound when they are in womb, it is no longer a delivery doctor who makes the first observation of genitals and thus the declaration of sex. Rather, it is usually the ultrasound technician, who is not a doctor, has not attended medical school, and is much lower ranked in the medical profession, in terms of expertise, prestige, and salary. Bourdieu's insistence on the power of authorization is not dismissed in this new example: it is still true that ultrasound technicians are professionals imbued with the technical skills deemed necessary for determining the sex of unborn children, and that their authorization as such gives credibility and indeed legal weight to their declarations of gender, declarations which are still cited in all future genderings of that child, and later adult, just as they were when doctors made the declaration.

However, the example highlights sedimentation at work. We are now able to have ultrasound technicians make the first declarations of gender precisely because the power of gender's declaration did not reside exclusively in the social position of the doctors who used to make such exclamations. Rather, as Butler explains, those doctors were only citing previous citations of gender, enforcing with every repetition both the power of the gendered declaration in determining various elements of the life of the child moving forward, but also the role of medical authority as the legitimate body responsible for the first gendering. Altering the vessel of the declaration, like changing the wedding officiant from a priest to an Elvis impersonator, does not alter the efficacy of the phrase uttered, because the utterance draws its performative power in part from its reference to all previous uses of the same linguistic formula, bolstered by the efficacy of those previous uses. Thus, while authorization still plays a role-- not *any* Elvis

impersonator can manifest a legal marriage union, only those Elvis impersonators with the necessary paperwork in the state of Nevada-- a significant and undertheorized portion of the interaction's performative power stems from the citation of previous uses, of the iteration of the ritual that draws from its predecessors, sedimenting the ritual into the future, while expanding the possible conditions under which it can still draw forth the "social magic" that Bourdieu attributes solely to social positionality.

Sedimentation and Dimensional Power

This concept of sedimentation is largely absent from Reed's account of performative theory, but this absence is surprising given his explanation of how performative power and discursive power are related, as in the analysis of why "queer" was successfully transformed away from its original use as a biting insult. In summary of Butler's examination of hate speech, Reed writes

> In this dynamic, 'micro-performatives' cycle back into the discursive formation that they themselves cite when they enact reappropriation and resistance. The point is that the citing of discursive codings can, depending on the situation and context, surprisingly twist the taken-for-granted meanings embedded in those codings. Over time, these performative reappropriations can alter the taken-for-granted discursive structure. The question of how this happens is rendered more complex by the question of whether such performatives are uttered by actors in civil society, or by actors acting in the name of the state, thus implying a relationship between micro-performatives and relational power as well. (207)

I agree that it is crucial to examine the relationship between the dimensions of power and to explore how their effects enable and constrain the effects of other dimensions. However, this summary is only a partial reading of Butler's insight into how performative acts "cycle back into the discursive formation." Dealing more squarely with Butler's concept of sedimentation seems a fitting approach to answering the very questions that Reed poses.

Rather than "cycling back," Butler suggests that it is a mistake to understand "discursive formations" as solid entities that perpetuate themselves as a result of their own momentum, or to see them as existing prior to, or entirely outside of, the purview of performative acts. Instead, Butler poses iteration as the process by which individual performative acts cite discursive formations, and in so doing bring those discourses into being. I believe Reed does not disagree with this last statement-- in drawing upon Sewell's example of the Bastille, he identifies the unique role of performative power in generating the concept of revolution, which became in many ways a discursive force of its own. However, adding the concept of sedimentation to this process allows space for the recognition of performative power not only in the creation of new discursive formations, but in the ongoing recreation that Butler insists is required for their maintenance, and the appearance of their self-standing durability.

While Reed draws upon Butler's examples of counternarratives coming into being and eventually incorporating themselves into previously existing narratives, like in the case of "queer," or the rise in the normativity of non-binary identifiers in the past several decades, Butler acknowledges these moments as outliers that do not explain how the majority of narratives by which we live the day to day of our lives come into being and are sustained, often even across centuries. Butler's primary examples of performative power at work are presented with

sedimentation at the core of normative social structures. In her foundational analysis of gender formation, Butler does not deny the relational and discursive elements of gender, particularly those highlighted by Bourdieu and Foucault, with whom she has a number of specific theoretical quarrels, but whom she does not dismiss forthright, and builds upon in many cases. The novelty of Butler's approach to gender lies in her identification of the phenomenon as perpetuated through the repetition of those "micro-performatives" that Reed mentions, not by "cycling back into the discursive formations that they themselves cite" as he writes, but by *forming* and continuously reforming that discourse. She takes a similar approach to the production and continual reproduction of the racial field of vision, in her analysis of the optics of the trial of Rodney King's assailants (1993).

While this may seem a quibble of minute semantics, this distinction is at the core of Butler's theory. Butler, following Derrida, insists that all citations are citations for which there is no original, that they are only references to all previous references-- that is, it's citations all the way down. In this process, transformations in discourse occur through (however slight) mis-citations, or partial citations, that attach the validity of a new signification to the authority of citations from which it is deviating. For example, Reed suggests that the success of "queer's" reclamation was enabled in part by the existing civil sphere discourse (Alexander 2008) of equal access to rights, etc. This is surely an important contributing factor. In Butler's language, though, every performance of the word "queer" as a powerful, positive self-identifier cited all previous uses of the word as an identity an individual could have as a result of their sexual preferences. Thus, the performative power in the social history of the word "queer" is not just in the transformation of its standard use from deeply negative to neutral or positive. Rather, every performance of the word constructs and reconstructs the discourse Foucault identifies in his

analysis of the advent of sexuality as an identity rather than as a category of behavior (Foucault 1978). As a result, what can be considered, on the one hand, a dramatic transformation in the sexual discourse that distinguishes moral from immoral, socially acceptable from unacceptable, etcetera, is also a recreation, and reinforcement, of the sexual discourse that dictates sexuality as a central identity.

Butler's use of Derrida sheds light on why this process cannot (or should not) be reduced to the power of discourse. Derrida sees the potential for boundless iteration as a characteristic of all signs, and a necessary component of a sign performing itself into existence at all. That is, if a sign were not able to be referenced recognizably in myriad circumstances, then it would not be a distinct unit of signification in and of itself. Butler critiques this line of reason as impractical for use in social theory as a) it dispenses entirely with matters of semantics, and b) approaching iteration as potential in all signs leaves no room for explaining why and how some signs undergo substantial resignification through their repetition, and others do not (questions to which Reed is also attuned, and to which he would add the questions of when and where resignification is made possible, incorporating temporality and power's various sources into the equation). The importance of the difference between Derrida's iteration and Butler's sedimentation speaks to the critique that Moore raises of approaches to structure and action that only examine "events," and moreover define events primarily as dramatic arbiters of significant change. Identifying the role of performative power only in situations that result in change misses a crucial part of the relationship between discursive and performative power.

In Reed's framework as is, there is somewhat of a dichotomy between the performative as an "autonomous" dimension of power, versus situations in which what appears to be performative can indeed be reduced entirely to the relational or (especially) the discursive. I

don't think this is a necessary dichotomy. Instead, incorporating the concept of sedimentation into uses of Reed's dimensions of power creates an approach that can distinguish and analyze the role of performative power in the maintenance of structures in addition to their creation and transformation.

In *Power and Modernity* (2020) Reed revisits the framework he presented in 2013, adding the dimension of materiality, and using the dimensional approach to power as the background for a theory of agency relations as nested interpretive sendings-and-bindings that accrue in chains of rectors, actors, and others pursuing various projects. He writes: "Performative power thus involves (1) an accrual of agency, (2) the dependence of this accrual for its efficacy on the dramatic felicity of the actions as interpreted by a public or audience, and therefore (3) the dependence of some kind of sending-and-binding, or exclusion from sending-and-binding, on the interpretation of frontstage drama" (78). In this presentation, Reed doubles down on performative power as primarily meaningful in moments of transformation and foundation, and attributes the power of performative power to its success in binding agents to each other (and thus binding future action) and to a level of publicity that creates felicity through binding large publics into shared projects necessary for preserving various norms.

Here, he moves away from the Butlerian approach to performativity, and where traces of Butler remain, they are primarily drawn from her works on agency, in *Gender Trouble* (1990) and *Antigone's Claim* (2000). This move is certainly very useful for conceptualizing the chains of agency that preoccupy *Power in Modernity,* but in stepping away from the specificity of Butler's concept of iteration as central to performative power, we lose some of the flexibility to account for the generativity that makes up existing bonds, as in the kinds of events that Moore identifies as important for social maintenance. Reed is aligned with Butler in the critique of

Bourdieu for failing to account for performativity's power to create new authorities in situ; to, through the very act of an utterance, authorize a previously unauthorized agent to speak. And, Reed (2017, 2020) is very attentive to the ongoing interpretive maintenance required for the sending and binding of agents through the repetitive representation of chains of power. But, greater attention to a sedimentation approach would allow for the possibility of greater nuance between the "autonomy of the performative" and the performative as "parasitic" on the discursive, in situations that maintain and perpetuate existing narrative structures.

Applications

One site for which the concept of sedimentation is particularly apt is the legal system. The structure of court cases closely mirrors the semiotic process that Butler and Ricoeur describe: court decisions, particularly those at the highest levels of the system, are inherently citational, with each decision necessarily building off of those that came before it. Each decision must either uphold or overturn prior decisions, making each case the site of a potential resignification. Regardless of whether the decision under question is upheld or overruled, the resulting decision is an Austinian illocutionary act: a court decision performs into being legality and illegality, citing prior legal discourses as the authority for its performative power, while simultaneously sedimenting that discourse into the authority to be cited in future cases.

The process of sedimentation offers a useful framework for analyzing both what is generated, as well as what is reproduced. These words are not negligible; they draw attention to the argument Abbott, Butler, and Ricoeur all make in varying ways: reproduction is itself a generative act. The production of a tradition, a structure, or a citable authority requires performative action, not just at its genesis, but at every point along its existence, to turn singular moments into a traceable sequence. In 2015 the SCOTUS case *Obergefell v. Hodges* determined

same-sex marriages to be a constitutional right. The decision was an illocutionary act in that it performed into being the legality of thousands of marriages across the country, and simultaneously overturned *Baker v. Nelson* as a legitimate precedent for state statutes against gay marriage. Certainly, there are many possible analyses of the relational factors that enabled this decision. However, fully understanding the discursive and performative dimensions of this decision requires the concept of sedimentation.

A Derridian approach to iteration suggests that the phenomenon of Elvis weddings is not unrelated to the decision in *Obergefell v. Hodges.* As an illocutionary act such as "I now pronounce you" becomes more malleable, performed with linguistic variations and in new contexts, its felicitous power *increases* with every instance in which it manages to obtain its intended effect in situations beyond the trappings of its previous prerequisites. While the performative power of the *Obergefell* decision did engender a wave of new possibilities for marriages, just as the birth of Vegas Elvis weddings did before it, they were, after all, still *marriages.* The discursive power of the decision reaffirmed, and indeed re-generated, the strength of the institution as a whole. Not only did the act enable thousands of same-sex couples to marry in states that had previously held bans, it also triggered the marriage of thousands of straight couples who had boycotted the institution until it was available to all (Waxman 2015). Thus, the performative act of *Obergefell* sedimented the discursive power of marriage as an institution, adding another layer of thickness to its authoritative weight, and increasing the number of contexts in which that authority could be successfully cited.

Likewise, in "Endangered/Endangering: Schematic Racism and White Paranoia," Butler (1993) applies the concept of sedimentation to the abuse of Rodney King. She argues that all levels of the US criminal justice system, from cops on the street to prosecutors in the courtroom,

exist within a racial field of vision that tints all visuals with the signifiers of racism, marking Black skin as threatening and violent, and filtering out the ability to fully see the human experiences of pain, suffering, and abuse when the people experiencing them are Black. The televisation of Rodney King's attack was one performative instance in the sedimentation of that racial field of vision. King's representation in the courtroom and in many news outlets as a wild animal primed at every moment to leap to his feet and create a threat to the dozen armed officers who stood around him, beating him, confirmed for many viewers the engrained perception of the relationship between Black masculinity and the potential for violence. The performative act of the court decision that acquitted his attackers legitimated this perception and became a legal precedent which future decisions could cite for authority.

This decision was just one in a long chain of decisions that together create, perform, and sediment the legal boundaries of legitimate police use of force against Black men and boys. Landmark Supreme Court cases like *Tennessee v. Garner* (1985), *Graham v. Connor* (1989), and *Scott v. Harris* (2007) establish a legal framework in which Black males are always already potential threats of violence, and police officers are permitted to use force, including deadly force, according to their reasonable perception of potential threats (Moore 2022). The concept of sedimentation helps us trace the relationship between the discursive and performative power at play, for example, in the media exposure of Tyre Nichols' death at the hands of five officers, all Black, in Memphis, TN, through its relation to the history of police brutality against Black men, and their resulting court cases.

Many news outlets have reported the fact that Nichols' assailants were *Black* officers with a tone of surprise, and the insinuation that the shared race of the victim and the assailants mitigates the potential accusation of racial animus as an impetus for the incident. Memphis

Chief of Police, CJ Davis, stated after the attack that "[the fact that the officers were Black] takes race off the table, but it does indicate to me that bias might be a factor also in the manner in which we engage the community" (Lartey and Cooper 2023). Tyre Nichols' death is not instigating dramatic new discourses. The release of video footage of the abuse that led to his death was not an act of performative power akin to the storming of the Bastille or the accusation of witchcraft against Puritan women. Instead, the footage has performative power that cites the authority of old arguments for use in a slightly new context, participating in the generations-long creation of discourses about Black masculinity and policing, sedimenting those discourses into predictable patterns that can be increasingly relied upon to produce their expected results in the courtroom.

It has to be noted that the fact that Nichols' assailants are Black is not a unique occurrence: several of the officers involved in the death of Freddy Gray in 2015 were Black, as was the officer who shot 15-year-old Edward Garner in Memphis in 1974, leading to the groundbreaking *Tennessee v. Garner* SCOTUS decision on which many police use-of-force cases are still based today. Nonetheless, the case is unusual enough in the narrative of publicized police uses of deadly force against Black males that it can function as a site for laying bare the discourses that are so ubiquitous as to become almost unseeable, as in Butler's racial field of vision.

First, comments like Chief Davis' reflect and perpetuate the narrative that white cops' violence against Black males is the result of explicit, intentional, racist animus, if the Blackness of cops "takes race off the table." Simultaneously, the incident performs a validation of an alternate discourse that has slowly been gaining legitimacy over a number of years: that policing itself is an institution that relies on anti-Black unconscious bias, as well as generations of

residential segregation, wealth inequality, and legal efforts such as the war on drugs, rendering the race of individual officers more or less irrelevant towards their likelihood of using disproportionate violence against Black males. Though these two discourses are ideologically at odds with one another, they are often perpetuated in tandem, as in the two side-by-side clauses of Chief Davis' statement. This co-constitution of incompatible discourses is not unusual-- we can think back to the way that Butler highlights the reclamation of the use of the word "queer" both as a performative act that unprofanes same-sex desire, and simultaneously sediments the discourse that sexual desire is a central tenet of one's identity, and of subject formation as a whole.

Tyre Nichols' death at the hands of Black officers not only expands the discourse of police officers' inherent tendency towards violence against Black men to include Black officers; it also expands the racist discourse of Black men's inherent tendency towards violence to include those Black men who happen to be police officers. It is too early to tell how these officers will fare in court, and how their actions and subsequent verdicts will be cited in future discussions of police violence. However, this incident functions as a performative act that further sediments the very discourse linking Black masculinity to perceived potential for violence that enabled the incident in the first place. The case offers a site at which to examine sedimentation in action, laid particularly visible by its perceived deviation from the normal narrative. That is, because the officers are Black, the case functions as an exception that reveals much hidden in more standard examples (Burawoy 1998), much like Kyle Rittenhouse's acquittal in the shooting of three white men in Kenosha, WI in 2021 (Moore, 2022). Will news outlets and legal counsels in the courtroom apply to these cops the language of animalistic aggression often used to describe Black men? Will the language of institutional racism prevail, side-stepping the accusation of

explicit racial animus that is often applied to cops who beat Black men? Any resignification, *and* any perpetuation of previously existing sign-signified pairings, will become a precedent able to be cited in future cases, expanding the context in which existing discourses can be used, and in so doing further sedimenting those discourses as an authority for future citation.

The concept of sedimentation offers a framework within which to analyze the relationship between power's discursive and performative dimensions. The articulation and clarification of this interplay sheds light on the role of performative power in re-creating and maintaining the patterns of action and interpretation that make up discourse, as well as the role of discourse in enabling and producing performative power. Moments of potential resignification, whether or not that resignification is ultimately foreclosed, are especially apt sites for the examination of sedimentation in process. Future work might utilize the concept to examine the kinds of legal cases I have touched on here, such as those with racial signification at their centers. Others might apply the concept to moments of rift in organizational and communal identities. The film *Women Talking* (2022), for example, depicts the women of a Mennonite community on the verge of collapse in the aftermath of years of heinous sexual abuse. An analysis of their discussion might use the framework of sedimentation to trace what is produced in the narratives they choose to maintain, and what is maintained and strengthened in the narratives they choose to resignify. Such cases require careful attention to the interpretations, citations, and reinterpretations that make up variably stable landscapes of meaning. The concept of sedimentation offers a language for empirically parsing that variation.

CONCLUSION

The preceding collection of articles has had two primary aims: 1. To offer the semiotic concepts of signification's temporal dimension and sedimentation as tools for unpacking the relationship between performative and discursive power and theorizing the processes by which interpretive narratives come into being, are resignified and/or perpetuated, and are transformed or become durable and long lasting. 2. To demonstrate the pragmatic utility of these two concepts for interrogating the performance and perpetuation of the racial state, by examining the court interpretations made for a KKK's burning cross, police violence against Black males, and Kyle Rittenhouse's Stand Your Ground trial.

Though the empirical data in these articles is drawn from court cases, I have not made legal arguments disputing or supporting particular interpretations, nor critiqued court decisions on the basis of their constitutionality, soundness of logic, or deviation from precedent. Instead, I have acknowledged the unique position of the court system and its various judges and justices as arbiters of interpretation on behalf of the state. In court cases, numerous interpretations of an event are aired by witnesses, lawyers, and court-recognized experts. The act of producing a verdict validates some of these interpretations and reject others. In cases that involve violence, these validations function to legitimate or delegitimate that violence. Because of the unique positionality of the state, as manifest in the court system, these legitimations are performative acts that bind the future, permitting or prohibiting future acts of similar violence, and creating justificatory narratives that extend into the future to be cited in subsequent cases. Unlike, for example, the interpretations of Kyle Rittenhouse's actions that anyone's uncle might make at Thanksgiving dinner, Rittenhouse's legal acquittal in court bears the performative weight of perpetuating a precedent that pre-authorizes other white men to use lethal force when they feel

endangered in similar circumstances. Likewise for the acquittal of men who burn crosses, and police officers who shoot unarmed Black boys.

The concept of sedimentation is particularly useful for analyzing the processes by which the state legitimates violence because it draws attention to the fact that repeated interpretations never become entirely immune to resignification, but become variably durable as a result of their continued re-use. For many decades, the acquittal of police officers who use lethal force against unarmed Black males was so routine as to be functionally predictable. A series of convictions against such officers in the past several years has begun a process of resignification that unsettles some of the interpretations that had become predictable in previous years, even as it reinforces and perpetuates many others. Attention to the way that interpretations develop durable semiotic mass through time can be a lens through which to examine ongoing court cases involving police brutality. Our current historical moment is one in which the pattern of the court's legitimation of police interpretations is no longer quite as durable as it was only a few years ago. The court decisions that take place in such cases over the next decade will be crucially important for determining what shape our sedimented history of racial violence will take on as it accumulates the discursive innovations of the new generation.

The racial state is not an entity that preexists action. It is performed into being with every police officer who automatically sees a Black boy in a park as a threat of violence, and every judge who legitimates that officer's fear as reasonable. Every cross burned by teenagers on the lawn of a Black family with whom they have quarreled, and every Justice who deems that burning cross a freedom of speech protected by the Constitution propels the racial state into the future. Insofar as there is a racial field of vision, it is a veil made up of all the interpretations we do not have to make for ourselves because we unconsciously rely on the interpretations that have

been made before us, citing their previous uses as the authority that legitimates them for us, not realizing that the next interpretation will cite us as its authority. While the concept of sedimentation bears testament to the fact that so many elements of the American racial state have calcified into thick and heavy stone over the past four hundred years, it also offers a theory of change and the potential for transformation. At its heart, a theory of performative power is a theory that holds space for progressive optimism-- the possibility that new actors might gain authority through the very process of their unauthorized acts. Acknowledging, celebrating, and harnessing the full capacity of the potential this dimension of power carries requires a careful and pragmatic approach to understanding the discursive weight that constrains, *and enables,* transformative acts of performative power.

Throughout this dissertation I have argued that existing cultural theories of performative power suffer from their disproportionate attention to moments of dramatic change and resignification. I have insisted that performative power is a crucial dimension of the maintenance and perpetuation of the narratives that have become so durable that they have been theorized as pre-existing structures. However, this recognition of performative power's role in persistence and stability has been towards the ultimate goal of theorizing and working for the ways in which change is possible. Understanding how our present is formed out of the sedimented layers of past interpretations allows us to reimagine how our future will be formed from the interpretations we make today.

In "Signs and Their Temporality" I argue that one of the stakes in *Virginia v. Black* is the production and validation of a historical narrative about racial violence in the U.S. One of the lawyers presents a history of the U.S. in which racial violence was constrained to the KKK's active reign of terror in the late 19th century, and that the KKK's contemporary activities are

merely expressions of racist ideology, rather than acts or threats of violence in and of themselves. The opposing argument is that the KKK's activity today is itself evidence that a culture of racial violence is still very much alive and well. Meanwhile, in 2023, a similar political debate is raging around how to teach the U.S.'s racial history from elementary school through to college. The 1619 Project, which centers slavery and its legacy in its approach to American history, has elicited widespread controversy, resulting in its outright ban from public schools in multiple states. Similar backlash has occurred over anything branded "critical race theory," from the mention of the word "privilege," to the suggestion that racial discrimination within the legal system is still prevalent today. Future research might apply the concept of sedimentation to analyses of how particular historical narratives are introduced into school curricula and become mainstream, and, on the other hand, how some representations of history are resignified and fall out of common use. For example, when and how did Dr. Martin Luther King Jr. become the universal figurehead for the Civil Rights Movement in American textbooks, and by what processes did a cohesive narrative representing some of his beliefs and modifying or concealing others become ubiquitous?

Similarly, a semiotic analysis of the relationship between power's discursive and performative dimensions might offer a useful way to interrogate how social movements establish, transform, and perpetuate cohesive narratives throughout time, particularly in the case of movements with significant presences on social media, providing vast data on how their mantras gain traction and cohere over time. Researchers might examine how the concept of "Black Lives Matter" as an organization at the heart of any public protest against police abuse of Black people gained the notoriety that allows the phrase "a BLM protest" to appear in countless news outlets every other week. Or, how did Tarana Burke's coining of the phrase "Me Too" in

2006 as part of a program helping underprivileged teenage girls process the trauma of sexual assault become the 2017 internet phenomenon in which celebrities accused their coworkers and directors of sexual misconduct, resulting in the infamous conviction of Harvey Weinstein, and eventually the phrase "he got MeToo'd" as an explanation for the career falls of male celebrity accussees? While the existing social movements literature offers many valuable explanations for these phenomena, specifically theorizing the acts of performative and discursive power at play in these developments draws attention to the narratives these movements bolster and perpetuate, as well as those that they resignify and transform.

The American racial state has been built out of layers upon layers of acts, signs, and interpretations that enable, legitimate, and perpetuate violence against Black people. New interpretations, new discourses, and new significations are possible. Attention to the temporal dimension of signification and the process of sedimentation offers us one way to understand the extent to which we are not damned to a future inexorably bound by our past. We are binding our future with each new performative act in our present. There is the potential for hope in this framework.

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